(19)

No. 92-519-ATX Title: Bolley Johnson, Speaker of the Florida House of Representatives, et al., Appellants
v.
Miguel De Grandy, et al.

Docketed:
September 22, 1992 Court: United States District Court
for the Northern District of Florida

Vide:
92-593
92-767

See also:
92-593
92-767

Entry	Date	Proceedings and Orders
	Jul 10 1992	Application (A92-32) for a stay pending appeal, submitted to Justice Kennedy.
	Jul 10 1992	Application (A92-32) referred to the Court by Justice Kennedy.
	Jul 10 1992	Response to application (A92-32) requested by Justice Kennedy, due July 14, 1992.
	Jul 14 1992	Response to application (A92-32) filed by DeGrandy Respondents.
	Jul 14 1992	(A92-32) Reply of Petitioners to Respondents opposition to stay filed.
	Jul 14 1992	(A92-32) Memorandum in opposition filed on behalf of the United States.
	Jul 16 1992	Application (A92-32) granted by the Court.
	Jul 17 1992	Application (A92-51) emergency relief from order of July 16th, submitted to Justice Kennedy.
	Jul 17 1992	Application (A92-51) referred to the Court by Justice Kennedy.
	Jul 17 1992	Application (A92-51) granted by the Court.
	Jul 17 1992	Response tc application (A92-51) filed by DeGrandy Respondents.
	Jul 17 1992	Response to application (A92-51) filed by United States.
	Sep 22 1992	Statement as to jurisdiction filed.
	Sep 22 1992	Appendix of appellants filed. VIDED.
	Oct 8 1992	Order granted extending time to file consolidated response to petition for wit of certiorari to and including November 27, 1992.
	Oct 20 1992	Order extending time to file response to jurisdictional statement until November 20, 1992.
	Nov 20 1992	Brief of appellee United States to affirm in part and vacate in part filed.
	Nov 24 1992	Motion of American Jewish Congress, et al. for leave to file a brief as amici curiae filed.
	Nov 25 1992	Brief amici curiae of Lewis N. Dodak, et al. filed.
	Nov 25 1992	Brief amici curiae of Florida State Representatives Cynthia Chestnut, et al. filed.
	Dec 30 1992	Motion of appellees Miguel DeGrandy, et al. to dismiss or affirm filed. VIDED.
	Jan 6 1993	DISTRIBUTED. February 19, 1993

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No. 92-519-ATX

Entry	Date	Proceedings and Orders
	Jan 15 1993	Reply brief of appellants filed.
	Feb 22 1993	Motion of American Jewish Congress, et al. for leave to file a brief as amici curiae GRANTED.
	Feb 22 1993	PROBABLE JURISDICTION NOTED. The case is consolidated with No. 92-593, De Grandy v. Wetherell, and No. 92-767, United States v. Florida, and a total of one hour is allotted for oral argument.
		**********
	Mar 16 1993	Order extending time to file brief of appellant on the merits until April 21, 1993.
	Mar 22 1993	Appellees' Briefs are due June 1, 1993.
	Apr 20 1993	Motion of American Jewish Congress, et al. for leave to file a brief as amici curiae in No. 92-519 filed.
	Apr 21 1993	Brief of appellants Bolley Johnson, et al. filed.
	Apr 21 1993	Brief amicus curiae of Anti-Defamation League of B'Nai B'Rith filed. VIDED.
	Apr 23 1993	Joint appendix filed. VIDED.
	May 7 1993	Motion of of the Acting Solicitor General for divided argument filed.
	May 7 1993	Motion of appellants in No. 92-519 and appellees in No. 92-593 and No. 92-719 for divided argument filed.
	May 24 1993	Motion of American Jewish Congress, et al. for leave to file a brief as amici curiae in No. 92-519 GRANTED.
	May 24 1993	REDISTRIBUTED. May 28, 1993
	May 25 1993	Record filed.
	May 28 1993	Brief of appellee Florida State Conference of NAACP Branches filed. VIDED.
	Jun 1 1993	Motion of of the Acting Solicitor General for divided argument GRANTED. in part. A total of 30 minutes for oral argument is allotted to the Acting Solicitor General and a total of 15 minutes for oral argument is allotted to the De Grandy plaintiffs. The motion of Florida and the state officials for divided argument is denied. A total of 45 minutes for oral argument is allotted to Florida and the state officials.
	Jun 1 1993	Brief of appellee United States filed.
	Jun 1 1993	Brief of appellees Miguel De Grandy, et al. filed.
	Jun 1 1993	Brief amici curiae of Mexican American Legal Defense and Educational Fund, et al. filed.
	Jun 1 1993	Motion of Lawyers' Committee for Civil Rights Under Law for leave to file a brief as amicus curiae filed.
	Jun 28 1993	Motion of Lawyers' Committee for Civil Rights Under Law for leave to file a brief as amicus curiae GRANTED.
	Jul 2 1993	Reply brief of appellants filed.
	Jul 2 1993	LODGING consisting of 10 copies of a letter received from counsel for the appellants.
	Aug 2 1993	CIRCULATED.
	Aug 16 1993	SET FOR ARGUMENT MONDAY, OCTOBER 4, 1993. (3RD CASE).
	Oct 4 1993	ARGUED.

No. 92-519

Supreme Court, U.S.
FILED
SEP 22 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

T. K. WETHERELL, Speaker of the Florida House of Representatives, PETER R. WALLACE, Chairman of the Reapportionment Committee of the Florida House of Representatives, LAWTON CHILES, Governor of the State of Florida, ROBERT A. BUTTERWORTH, Attorney General of the State of Florida, and JIM SMITH, Secretary of State of the State of Florida,

Appellants,

v.

MIGUEL DE GRANDY, MARIO DIAZ-BALART, ANDY IRELAND, CASIMER SMERICKI, VAN B. POOLE, TERRY KETCHEL, ROBERTO CASAS, RODOLFO GARCIA, JR., LUIS ROJAS, LINCOLN DIAZ-BALART, JAVIER SOUTO, JUSTO LUIS POSO, ALBERTO CARDENAS, REY VELAZQUEZ, LUIS MORSE, ALBERTO GUTMAN, KAREN E. BUTLER, SGT. AUGUSTA CARTER, JEAN VAN METER, ANNA M. PINELLAS, ROBERT WOODY, GINA HAHN, BILL PETERSEN, TERRY KESTER, MARGIE KINCAID and BROOKS WHITE and the UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Northern District of Florida

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a state-enacted reapportionment plan violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because it does not maximize the electoral opportunities of a class of minority plaintiffs, notwithstanding that the plan provides the minority class with the opportunity to elect representatives in numbers at least equal to the class's proportion of the population?

2. When determining minority voting strength under the test of *Thornburg v. Gingles*, 478 U.S. 30 (1986), may a plaintiff's case rest on estimates of voting age population that include substantial numbers of noncitizens who are ineligible to vote, or must the plaintiff demonstrate voting strength on the basis of eligible voters, at least where the defendant has demonstrated that a substantial percentage of the plaintiff class are not citizens?

3. May a federal court impose a reapportionment plan as a remedy for a Voting Rights Act violation without affording the State any opportunity to devise an acceptable remedial plan, especially when the court-ordered plan unnecessarily trenches on fundamental state policy choices?

4. Do core principles of comity and federalism require a federal court to abstain from adjudicating Voting Rights Act claims when the plaintiffs seeking federal court relief have previously raised, and demanded and received adjudication of, identical claims in an ongoing state court proceeding?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. ——

T.K. WETHERELL, Speaker of the Florida House of Representatives, *et al.*,

Appellants,

v.

MIGUEL DE GRANDY, *et al.*,

Appellees.

On Appeal from the United States District Court for the Northern District of Florida

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JURISDICTIONAL STATEMENT

Speaker T.K. Wetherell, Representative Peter R. Wallace, Governor Lawton Chiles, Attorney General Robert A. Butterworth and Secretary of State Jim Smith, in their official capacities, appeal from the final judgment of the three-judge United States District Court for the Northern District of Florida, dated July 2, 1992, holding that the reapportionment plan for the Florida State Legislature, Senate Joint Resolution 2-G, violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

OPINIONS BELOW

The July 17, 1992 opinion of the three-judge United States District Court for the Northern District of Florida in Nos. 92-40015-WS, 92-40131-WS, and 92-40220-WS ("July 17 Op."), holding that Senate Joint Resolution 2-G violates Section 2 of the Voting Rights Act, has not yet been reported, and appears in the appendix hereto at 7a. The May 29, 1992 opinion of the three-judge court

in Nos. 92-40015-WS, and 92-40131-WS, reapportioning districts for the United States Congress, has not yet been reported, and appears in the appendix hereto at 77a.

JURISDICTION

The judgment finding that Senate Joint Resolution 2-G violates the Voting Rights Act was entered on July 2, 1992. Appellants Wetherell and Wallace filed a notice of appeal to this Court on July 24, 1992. Appendix ("App.") 141a. Appellants Chiles, Butterworth and Smith filed a notice of appeal to this Court on July 29, 1992. App. 143a. This appeal is being docketed within 60 days of July 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.[1]

STATUTORY PROVISIONS INVOLVED

See appendix at 211a.

STATEMENT OF THE CASE

A. The State Reapportionment Process.

In the wake of the 1990 census, the Florida legislature established House and Senate committees, made up of members from both political parties and major ethnic groups in the State, to propose a plan for reapportionment of the state legislature.

Acutely conscious of their responsibilities under the Voting Rights Act, these legislators sought a plan that would protect the voting rights of Florida's minority populations and achieve a fair allocation of political power among the State's racial and ethnic groups.[2] Members of the Florida Caucus of Black State Legislators served on the committees, and played an active role throughout the

[1] Appellants do not seek relief from the judgment of the district court dated May 29, 1992, involving reapportionment of the Florida districts for the United States House of Representatives. To the extent subsidiary findings contained in the court's May 29 opinion and judgment form a basis for the court's July 2, 1992 order, appellants challenge those findings.

[2] Testimony of Peter R. Wallace, Tr. VII, 164, App. 202a.

redistricting process.[3] Hispanic representatives, including Representative Miguel De Grandy, the principal private plaintiff in this case, also served on the committees and played an active role.[4] Community groups and other interested organizations, including the Florida Chapter of the NAACP, participated actively as well.[5]

"[P]olitical considerations are inseparable from districting and apportionment."[6] Achieving a fair accommodation of the competing social and political considerations in Florida proved particularly difficult. The State's ethnic diversity, explosive population growth, complex political alignments, and a host of other political and regional pressures posed serious obstacles to creating a reapportionment plan that could command majority assent in the legislature. Despite these difficulties, on April 10, 1992, the Florida legislature adopted Senate Joint Resolution 2-G ("SJR 2-G"), the redistricting law at issue in this case.[7]

B. The State Reapportionment Plan.

SJR 2-G divides the State into 40 single member Senate districts and 120 single member House districts. Dade County posed by far the greatest redistricting challenge because it comprises substantial Hispanic, African Amer-

[3] Testimony of Representative Willie Logan (caucus chairman) Tr. VII, 73-77, App. 198a.

[4] Testimony of Representative Miguel De Grandy, Tr. IV, 21, 42-45, 50.

[5] Testimony of Leon Russell (Vice President, State Conference of the NAACP), Tr. III, 107-08; Tr. VII, 139 (expressing NAACP support for Dade County House redistricting in SJR 2-G, and noting NAACP participation in its drafting and implementation), App. 201a.

[6] *Davis v. Bandemer*, 478 U.S. 109, 128 (1986) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973)); *see also White v. Weiser*, 412 U.S. 783, 794-95 (1973).

[7] In this respect, the Florida legislature succeeded where other similarly situated state legislatures have not. *See Wilson v. Eu*, 4 Cal. Rptr. 2d 379 (S. Ct. 1992).

ican and Anglo populations (including distinct Jewish communities of interest), all living in close proximity in a densely populated urban area. In the last decade, Dade County's overall population grew by 19 percent.[8] The Hispanic population increased by more than 350,000 persons (or 64%), principally as a result of immigration from Cuba, Nicaragua, Columbia, Peru and other Latin American nations.[9]

The population of Dade County supports 6 Senate and 18 House districts.[10] Under SJR 2-G, Hispanics, who constitute approximately 50% of the voting age population in the County, will constitute a majority of the voting age population in 3 of the 6 Dade County Senate districts and 9 of the 18 Dade County House districts.[11] African Americans, who constitute approximately 18% of the voting age population, will constitute a majority of the voting age population in 2 of the 6 Dade Senate districts and 4 of the 18 Dade House districts.

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[8] Testimony of George Meier, Tr. V, 204.

[9] Testimony of Dr. Dario Moreno (expert witness for plaintiffs), Tr. II, 14, 18-19 ("Miami became a magnet for 400,000 Latin American refugees during the 1980s . . . the reason for it was the . . . existence of a large Hispanic enclave . . . in which Latin Americans felt they could come here without suffering the kind of language barriers and discrimination barriers they would suffer in other large U.S. cities"), App. 184a.

[10] The population of Dade County is 1,937,094. The ideal House district is 107,816. Thus, 17.94 House districts can be contained within Dade County. Technically, 17 SJR 2-G House districts are wholly contained within the Dade County borders. An eighteenth district is contained substantially within Dade County. *See* Testimony of George Meier, Tr. V, 203, 210, App. 186a.

[11] *See* P. Exh. 5 (SJR 2-G), App. 171a, 183a (setting forth percentages of Hispanic voters in districts in Dade County area).

There has been some dispute in this case whether the relevant geographic area for analysis was Dade County proper, or, as plaintiffs alleged, a somewhat larger "Dade County area" comprising House Districts 101-120. If this larger area provides the relevant frame of reference, the fact of proportional representation remains. Hispanic voting age population of this 20 district area is approximately 46.7%, App. 180a-182a, and SJR 2-G ensures Hispanic voters

The remaining five Dade County House districts contain Anglo voting age majorities, but one includes a substantial African American population and is represented in the House by an African American.[12] Another contains a Hispanic voting age population of 46%,[13] and, if Hispanic population in the district increases, could well become a Hispanic majority district.

C. Legal Challenges To The Plan

1. *State Court Proceedings.*

Voting Rights Act challenges were raised *first* in Florida Supreme Court proceedings reviewing SJR 2-G pursuant to Article III, Section 16(c) of the Florida Constitution.[14] SJR 2-G was submitted to the Florida Supreme Court for review on April 13, 1992, after legislative enactment on April 10, 1992, to determine whether it was legally "valid." The private plaintiffs in the instant federal proceeding ("the De Grandy plaintiffs")[15] participated in that proceeding, and contended that SJR 2-G was not "valid" because it diluted Hispanic voting strength in Dade County in violation of Section 2 of the Voting Rights Act.[16]

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an opportunity to elect candidates of choice in at least 9 of the 20 districts (45%).

[12] Wallace Testimony, Tr. VII, 164, App. 202a; Logan Testimony, Tr. III, 164.

[13] De Grandy Testimony, Tr. IV, 51, App. 185a.

[14] "(c) JUDICIAL REVIEW OF APPORTIONMENT. Within fifteen days after the passage of the joint resolution of apportionment, the attorney general shall petition the supreme court of the state for a declaratory judgment determining the validity of the apportionment. The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment."

[15] Numerous private plaintiffs filed claims attacking SJR 2-G. They will be jointly referred to as the De Grandy plaintiffs.

[16] Their state court brief repeatedly argued that the Florida Supreme Court was required to adjudicate challenges under Section 2 of the Voting Rights Act. *See* Brief of Miguel De Grandy,

In its May 13, 1992, opinion, the Florida Supreme Court asserted jurisdiction over these Voting Rights Act claims. The court held that SJR 2-G "does not discriminate against minorities," "is a material improvement over conditions under the 1982 plan," "is not significantly less favorable to minorities than other proposed plans, and provides a substantial opportunity for minorities to influence elections and elect representatives of their choice." *In re: Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 285 (Fla. 1992); App. 104a.

The Florida Supreme Court issued this ruling without prejudice to further consideration. In its May 13 order, the court retained jurisdiction, specifically invited interested parties to file "a petition in this Court alleging how the plan violates the Voting Rights Act" and provided for "expedited disposition" after a full evidentiary hearing. *Id.* at 285-86. No party availed itself of this opportunity.[17]

2. *Federal Pre-trial Proceedings.*

One month later, on June 18, 1992, the De Grandy plaintiffs sought to raise identical Section 2 claims against

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Et Al. In Opposition To Constitutionality of Joint Resolution 2G (filed April 24, 1992 in Fla. S. Ct. No. 79,674) at 9 ("This Court cannot fulfill its duty . . . unless it first finds that the plan meets the standards of the Voting Rights Act"); *id.* at 13 (court "must, in actuality, conduct both a Section 2 and a Section 5 analysis"); *id.* at 15 ("United States Constitution requires [Florida Supreme Court] to conduct a full Section 2 analysis on the basis of full evidentiary proceedings"); App. 168a.

[17] Five counties in Florida are subject to the preclearance requirements of Section 5 of the Voting Rights Act. Accordingly, SJR 2-G was submitted to the U.S. Department of Justice for preclearance on April 17, 1992. On June 16, 1992, the Department precleared SJR 2-G's reapportionment of the House of Representatives. The Department objected to the drawing of one district in SJR 2-G's reapportionment of the Senate. That district was in the Tampa area, and is not at issue in this appeal. Both the Florida Supreme Court and the court below issued orders implementing an identical "remedy" for the Section 5 Senate deficiency identified by the Department.

SJR 2-G in federal court. They did so by seeking to amend a complaint they had previously filed in federal court raising constitutional challenges to Florida's 1980 legislative districts.[18] Defendants moved to dismiss all Section 2 claims on the grounds of abstention and *res judicata*, in light of the Florida Supreme Court's May 13 ruling. App. 210a.

On June 22, 1992, the federal district court granted the De Grandy plaintiffs leave to amend. The next day, the United States filed a complaint alleging violations of Section 2 similar to those the De Grandy plaintiffs had previously raised with respect to Dade County.[19] The United States also moved for a preliminary injunction on June 25, 1992.

The next morning, June 26th, the district court denied the preliminary injunction motion, denied defendants' motion to dismiss, consolidated the United States' case with that of the De Grandy plaintiffs, and ordered trial to commence immediately that same day on both complaints. App. 204a; July 17 Op. at 14, n.9, App. 19a. Defendants were afforded no opportunity to take discovery to ascertain the factual basis for plaintiffs' allegations, to seek summary judgment, or to prepare a complete trial defense.

3. *The Federal Court Trial.*

a. *The liability phase.* The De Grandy plaintiffs' June 18 amended complaint alleged Voting Rights Act viola-

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[18] On the opening day of the 1992 legislative session—a session called in part to reapportion on the basis of the recently released 1990 census data—the De Grandy plaintiffs filed a complaint in federal court alleging that the legislative districts premised on the prior 1980 census had become malapportioned as a result of population changes, and seeking federal injunctive relief. That complaint was mooted by passage of SJR 2-G, which reapportioned the state legislature in conformity with constitutional requirements.

[19] The United States had been aware of SJR 2-G and of the litigation for several months. Indeed, defendants filed a third-party complaint against the United States in this action, and the United States moved to dismiss that claim on May 10, 1992. Furthermore, SJR 2-G had been submitted to the Justice Department for Preclearance on April 17, 1992.

tions in several Florida counties. The United States similarly alleged violations "in Dade County and elsewhere."[20] During opening statement, however, counsel for the United States expressly limited the claims of Hispanic vote dilution to Dade County.[21] Two days into trial, the De Grandy plaintiffs voluntarily dismissed all Hispanic vote dilution claims outside Dade County.[22]

Plaintiffs claimed additional Hispanic majority Senate and House districts could have been created in Dade County absent alleged "fragmentation" of Hispanic voters.[23] Plaintiffs attempted to show that voting in Dade County was racially polarized, that Hispanic voters in Dade County were politically cohesive, and that 4 Hispanic Senate districts (instead of SJR 2-G's 3) and 11 Hispanic House districts (instead of SJR 2-G's 9) could have been created in Dade County. Plaintiffs argued that the legislature's failure to enact alternative plans proposed by plaintiff De Grandy and plaintiff Reaves, which would have created the additional Hispanic districts, violated Section 2. These alternative plans, according to plaintiff Reaves, were designed "to maximize the majority-minority districts" in Dade County.[24]

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[20] Complaint of the United States, § 8.

[21] Tr. I, 51, 53, 101. In opening statement, and at trial, plaintiffs made allegations with respect to Escambia County as well. The Escambia County issues, which involved African American voters, did not proceed to a litigated judgment and are not part of this appeal.

[22] Tr. III, 8 (motion of counsel); Tr. III, 214 (oral ruling granting motion). *See also* July 17 Op. at 16, n.13; App. 21a.

[23] U.S. Complaint, Count I, ¶¶ 8(a), 8(c). The De Grandy plaintiffs' complaint made substantively identical allegations. *See* De Grandy Third Amended Complaint, Count VIII, ¶ 142.

[24] *See* Tr. II, 179 (testimony of Darryl Reaves); *see also* Tr. II, 184 ("you must create the maximum number of Hispanic districts in Dade County"); Tr. IV, 104.

Plaintiffs introduced two alternative plans during the liability phase of the proceedings. One was sponsored by plaintiff De Grandy, a Hispanic member of the House. Another was sponsored by plaintiff Reaves, an African American member of the House. With respect to Dade County, "the Reaves-Brown plan and the De Grandy plan are virtually identical." Tr. IV, 29 (testimony of plaintiff De Grandy).

Based on undisputed evidence that Hispanic voters could elect representatives of choice in numbers equal to the Hispanic percentage of the Dade County voting age population, defendants argued that Section 2 was not violated because SJR 2-G guaranteed Hispanic voters an opportunity to elect candidates of choice at least equal to that of other members of the Dade County electorate.[25]

Defendants also argued that plaintiffs' evidence substantially overstated Dade County Hispanic voting strength by counting noncitizens who are ineligible to register and vote. Defendants' unrebutted expert testimony showed that approximately 50% of the Dade County Hispanic voting age population were noncitizens, and that several districts in plaintiffs' alternative plans would not contain Hispanic voting age majorities once this citizenship factor was taken into account.[26] By failing to rebut this showing, defendants argued, plaintiffs had not carried their Section 2 burden of proof.[27]

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[25] Defendants raised this defense in motions for directed verdict, and in closing arguments, *see* Tr. III, 212, VII, 78-79. Defendants introduced evidence demonstrating proportionality. *See* Testimony of George Meier, Tr. VI, 210-11, App. 186a; Testimony of Representative Logan, Tr. VII, 98, App. 201a. Defendants also cross-examined plaintiffs' expert witnesses on this question. *See* Tr. III, 283; Tr. IV, 86; Tr. III, 245-249.

[26] Testimony of William DeGrove (expert demographer), Tr. VII, 23-24, App. 197a-198a; Defendants' Joint Exhibit 2, App. 206a. *See also* July 17, Op. at 33-34; App. 37a-38a.

[27] During trial, the district court repeatedly ruled "as a matter of law that the relevant inquiry in this case is voting age population." Tr. V, 40; *see also* Tr. V, 44 (same); Tr. V, 47 (court's ruling "means that citizenship is not important").

On the evening of July 1, 1992, after closing argument on the Senate portion of SJR 2-G, the court ruled that:

> The plaintiffs have shown that a fourth Hispanic district can be drawn in accordance with the *Gingles* standard, but the plaintiffs have failed to prove that a fourth Hispanic district can be drawn without creating a retrogressive effect upon Afro-American voters in Dade County. . . . Consequently, this Court must give deference to the state policy as expressed in the Florida plan as validated by the Florida Supreme Court.

Tr. VIII, 53, App. 202a. After closing argument on the House portion of SJR 2-G, the court ruled that:

> under the totality of the circumstances the plaintiffs have shown a violation of Section 2 *in that the plaintiffs have shown that more than nine Hispanic districts may be drawn* without having or creating a regressive effect upon black voters in South Florida and in Dade County.

Tr. VIII, 82 (emphasis added), App. 203a.

b. *The remedial proceedings.* The remedial proceedings commenced at approximately 7 p.m. on July 1st—one hour after the liability judgment was entered. As the proceeding began, the De Grandy plaintiffs introduced a new proposed remedial plan "just hot off the press here about thirty minutes ago." Tr. VIII, 96-97 (statement of plaintiffs' counsel). That plan—which the court referred to as the "modified De Grandy plan"—had never been produced to defendants or the court. The United States had not previously seen, and did not endorse, the plan.[28]

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[28] Counsel for the United States stated that counsel for the private plaintiffs "has additional remedial alternatives that he wants to put before the Court that also may well meet the requirements of the Voting Rights Act. *I haven't studied them sufficiently to address that point*, but I leave it to him." Tr. VIII, 96 (emphasis added).

The modified De Grandy plan radically reshaped not only the boundaries of the eighteen disputed Dade County House districts but also the boundaries of all *thirty-one* House districts in South Florida. *See* note 46 *infra*.

The district court heard argument on the relative merits of the remedial plans before it, but refused to permit evidentiary submissions.[29] Plaintiff De Grandy—a previously sworn witness—argued from the podium that the modified De Grandy plan protected Hispanic voting opportunity better than did other remedial options, without substantial impairment of the state policies advanced in SJR 2-G. Those factual assertions were unsworn and not subject to cross-examination.

Less than three hours after the remedial hearing began, the court abruptly halted the proceedings and ordered implementation of the modified De Grandy plan. The court refused pleas from defendants, the NAACP, and *amici* representing Jewish voters to adjourn the proceeding to permit scrutiny of the modified De Grandy plan and consideration of other remedial options.[30]

On July 2, 1992, the court entered separate judgments with respect to the Senate and House portions of SJR 2-G. In the Senate judgment, the court ordered the implementation of the Senate portion of SJR 2-G. App. 4a. In the House judgment, the court held that SJR 2-G violated Section 2 by diluting Hispanic voting strength, and ordered implementation of the modified De Grandy plan as a remedy. App. 1a.

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[29] Tr. VIII, 98 ("We do not intend to hear any more evidence regarding plans"). Appellants objected to the remedial proceedings because they failed to provide any meaningful opportunity for adjudication of the critical issues at stake. App. 203a.

[30] Tr. VIII, 104. In view of the truncated nature of the remedial proceedings, the House defendants subsequently filed a motion for reconsideration. In their motion, the House defendants proffered some of the evidence they would have presented had they been given the opportunity, demonstrating partisan bias, unnecessary district reconfiguration and other flaws in the remedy adopted by the Court. *See* Motion for Reconsideration and Affidavits of George Meier and Kimball Brace attached thereto, July 2, 1992, App. 145a.

D. The Three-Judge District Court's Opinion.

On July 17, 1992, the three-judge court issued an opinion "that memorializes and explains the court's rationale for its July 2, 1992 rulings." App. 24a. The court sought guidance from this Court's opinions in *Thornburg v. Gingles*, 478 U.S. 30 (1986), despite uncertainty whether those standards applied to "a challenge to single member districts." App. 29a.[31]

Applying *Gingles*, the court held that both the Senate and House portions of SJR 2-G violated Section 2. The court did not address defendants' argument that SJR 2-G provided Dade County Hispanic voters electoral opportunity at least equal to the opportunity afforded other members of the Dade County electorate. Indeed the court appeared to find it irrelevant that SJR 2-G imposed no discriminatory harm on Dade County Hispanics because it fairly allocated political power among Dade County's many racial and ethnic populations. As Judge Vinson's concurring opinion explained:

> the plaintiffs have established in the De Grandy plan that eleven districts can be established in which Hispanics constitute over 64% of the voting age population and which are geographically compact. Further, these districts can be drawn without any dilution of African-American voting strength. Therefore, plaintiffs have established *all requisites* of their Section 2 claims.

[31] The first *Gingles* factor requires a determination that the minority population is sufficiently large and geographically compact to permit the creation of single member districts where the minority can elect candidates of choice. The second *Gingles* factor requires a determination that the minority population is politically cohesive. The third *Gingles* factor requires a determination that, as a result of racially polarized voting, the white majority is usually able to defeat Hispanic candidates of choice. 478 U.S. at 49-50.

The district court noted that "the effect of proving these three [*Gingles*] preconditions is an open question" in the Eleventh Circuit. App. 30a.

App. 74a (emphasis added).[32]

The court attempted to harmonize its finding that the Senate portion of SJR 2-G violated Section 2, with its July 2 order implementing that portion of SJR 2-G unchanged. The court "explained" that, "while the plaintiffs . . . established a section 2 violation as to the four Hispanic [Senate] districts, any remedy . . . would violate Section 2 as to African Americans" by diluting their voting strength. Faced with this conflict, the court concluded, with respect to the remedy, that it was required to defer to the legislative judgment despite the violation. App. 63a, 66a. That "explanation" stands in stark contrast to the court's July 2 order, which held that "Florida's state senate districts . . . do not violate Section 2." App. 5a.

The court then explained its remedial order for the House. The court chose the modified De Grandy plan on the ground that it provided more assurance that the 11 Hispanic districts would be effective than did the remedial plan offered by the House defendants. The court based this conclusion on what it described as the "testimony" of plaintiff De Grandy during the remedial proceedings. App. 70a-71a.

[32] Notwithstanding the court's repeated rulings at trial that evidence of citizenship was irrelevant, *see* note 29 *supra*, the court's subsequent opinion addressed the "citizenship" issue at length. The court held that, because all 11 Hispanic House districts in plaintiffs' proposed alternative plan contained at least 60% Hispanic voting age residents "and, therefore, 'satisf[y]' the 65% rule, the court need not inquire further as to the Hispanic citizenship levels in each proposed district." July 17 Op. at 37 n.28; App. 40a. The "65% rule" relied on by the court is a rule of thumb used by courts in Section 2 remedial proceedings, once liability has been determined, to determine whether a proposed minority district will be effective. The rule is premised on a need for a super-majority of minority voters in a district to compensate for low voter turnout, low registration rates, and the younger age structure of minority populations. It is not a rule that has been used to establish whether the Act has been violated.

E. Prior Proceedings In This Court.

On June 26, 1992. Appellants applied to Justice Kennedy for a stay of the district court proceedings. The stay was denied.

On July 10, 1992, Appellants applied to Justice Kennedy for a stay of the district court's July 2, 1992 order. Justice Kennedy referred the application to the full Court. On July 16, 1992, a unanimous Court granted the stay. *See* Stay Order in No. A-32, App. 139a.

Notwithstanding this Court's stay order, on the evening of July 16, 1992, the district court issued an order requiring that candidate qualification for the 1992 Florida legislative elections be carried out in accordance with the modified De Grandy plan.

On the morning of July 17, 1992, Appellants applied to Justice Kennedy for a stay of the district court's July 16, 1992 order. That application was referred to the full court, and was unanimously granted on the evening of July 17, 1992. *See* Stay Order in No. A-51, App. 140a.

THE QUESTIONS ARE SUBSTANTIAL

I. THIS COURT SHOULD DETERMINE WHETHER A STATE-ENACTED REAPPORTIONMENT PLAN VIOLATES SECTION 2 OF THE VOTING RIGHTS ACT BECAUSE IT DOES NOT MAXIMIZE THE ELECTORAL OPPORTUNITIES OF A CLASS OF MINORITY PLAINTIFFS, NOTWITHSTANDING THAT THE PLAN PROVIDES THE MINORITY CLASS WITH THE OPPORTUNITY TO ELECT CANDIDATES IN NUMBERS AT LEAST EQUAL TO THE CLASS'S PROPORTION OF THE POPULATION.

Section 2 of the Voting Rights Act protects against "denial or abridgement of the right of any citizen of the United States to vote." 42 U.S.C. § 1973(a). Because the right to vote can be abridged even if the ability to cast a ballot is preserved, Section 2 prohibits any electoral procedure that causes a class protected by the Act to "have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice." *Id.* § 1973(b).

Though easily stated, this standard has proven difficult to apply. Members of this Court have repeatedly recognized that "in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." *Thornburg v. Gingles*, 478 U.S. at 88 (O'Connor J. concurring, joined by Burger, C.J., Rehnquist, J. (now C.J.), and Powell, J.).[33] Congress has provided some guidance by expressly providing that Section 2 does not establish a right to proportional representation, 42 U.S.C. § 1973(b). Ultimately, however, the task of enunciating a standard for determining when members of a protected class have received "enough" legislative districts has fallen to the courts.[34]

In this case, the district court adopted a straightforward but plainly erroneous standard—the application of

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[33] *See also Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002, 1012 (1984) (Rehnquist, J. (now C.J.) dissenting from summary affirmance) ("the phrase [vote dilution] itself suggests a norm with respect to which the fact of dilution may be ascertained"). *See also Chisom v. Roemer*, 111 S. Ct. 2354, 2375 (1991) (Scalia, J., joined by Rehnquist, C.J. and Kennedy, J., dissenting).

[34] Federal courts are in substantial confusion with respect to the proper standard for analyzing vote dilution challenges to single-member districts. *See, e.g., Solomon v. Liberty County of Florida*, 899 F.2d 1012 (11th Cir. 1990), in which the Eleventh Circuit *en banc* could not agree on how *Gingles* should apply. *See also Burton v. Sheheen*, 793 F. Supp. 1329 (D.S.C. 1992) (three-judge court) ("it is not entirely clear to what extent *Gingles* applies to . . . single-member districts"), *appeal filed*, 61 U.S.L.W. 3083 (July 21, 1992); *Nash v. Blunt*, Civ. No. 91-0840 CV-W-2, 1992 WL 105612 (W.D. Co. July 15, 1992) (three-judge court); *Quilter v. Voinovich*, Civ. No. 5:91 CV 2219, 1992 WL 114748 (N.D. Ohio Jan. 31, 1992) (three-judge court), *probable jurisdiction noted*, 112 S. Ct. 2299 (1992); *Growe v. Emison*, 782 F. Supp. 427 (D. Minn.) (three-judge court), *probable jurisdiction noted*, 112 S. Ct. 1557 (1992).

which urgently requires this Court's review. After comparing SJR 2-G to alternative plans designed to *maximize* the number of Hispanic districts in Dade County, the court held that SJR 2-G violated Section 2 "in that the plaintiffs have shown that more . . . districts may be drawn" than were drawn. Tr. VIII, 82. The court believed that this evidence proved a Section 2 violation because—once political cohesion and racially polarized voting are shown—Section 2 requires nothing more than a demonstration that additional districts could have been, but were not, drawn. As Judge Vinson explained in his concurrence, the district court believed that the three *Gingles* factors constituted "all requisites" of a Section 2 claim. App. 74a.[35]

The district court's standard effectively imposes a requirement of "maximization" because any failure to draw additional minority districts that could be drawn will violate Section 2 so long as racially polarized voting exists.[36] Applying that standard, the district court redrew the legislative map for more than a quarter of Florida's population. This extreme application of Section 2 in a case of such importance to the people of Florida warrants plenary review for at least three reasons.

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[35] *See Solomon v. Liberty County of Florida*, 899 F.2d 1012, 1017 (11th Cir. 1990) (*en banc*) ("proof of the three *Gingles* factors is both necessary, and, in this case, sufficient for a Section 2 vote dilution claim") (concurring opinion of Kravitch, J.). Judge Hatchett, who presided in the proceedings below, joined Judge Kravitch's opinion in *Solomon*.

[36] Some States have interpreted *Gingles* in precisely this way. In California, for example, special masters sought to "accommodate the interests of *every* functional, geographically compact minority group of sufficient voting strength to constitute a majority in a single member district" because that was the only way to "eliminate . . . any possibility of challenge[] under Section 2." *See Wilson v. Eu*, 4 Cal. Rptr. 379, 399 (Cal. S. Ct. 1992) (quoting special masters' report). *See also, Quilter v. Voinovich*, Civ. No. 5:91 CV 2219, 1992 WL 114748 (N.D. Ohio Jan. 31, 1992) (three-judge court) (describing action of Ohio reapportionment commission), *probable jurisdiction noted*, 112 S. Ct. 2299 (1992).

First, the maximization concept that the district court derived from *Gingles* has surprisingly little relation to the relative population level of a group protected by Section 2, and is thus a poor indicator of whether the group has fair and equal electoral opportunity. For example, in a hypothetical 10-district jurisdiction with 100 voters per district (1,000 total voters), a group constituting 50% of the population (500 voters) could control up to 9 of the 10 districts, so long as their geographic dispersion was such that 9 districts could be drawn containing 51 members of the group (9 x 51 = 459).[37]

Such results cannot be justified by the text or purpose of the Voting Rights Act. The maximization standard has nothing to do with whether citizens have been allowed to vote or whether the members of a protected class have "had less opportunity than others to participate in the electoral process and to elect representatives of their choice."[38]

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[37] Similarly, depending on where minority voters live and how district lines are drawn, a group constituting only 38% of the population could control three of five legislative districts even when the minority must have at least a 60% majority in a district to ensure election of a candidate of choice:

D #	Group 1	Group 2	Total
1	0	20,000	20,000
2	0	20,000	20,000
3	12,666	7,334	20,000
4	12,666	7,334	20,000
5	12,668	7,332	20,000

In this hypothetical, Group 1 makes up 38% of the population in an area which is to be divided into five districts of 20,000 persons each.

[38] Indeed, this extreme understanding of *Gingles* drove the district court to the otherwise inexplicable conclusion that the Senate portion of SJR 2-G violated Section 2 by diluting Hispanic voting strength, but should nonetheless be implemented—unchanged—as the remedy for the Section 2 violation. The court found, in essence, that the rights of both Hispanic and African American voters had been violated because the number of Dade County districts for each group was not maximized—even though maximization of one group's voting power would detract from that of the other. In this situation,

Second, the district court's maximization standard conflicts directly with the judgment of Congress and this Court that the Voting Rights Act is a remedial statute whose use must be preceded by a finding that the right to vote has been denied or abridged. Discrimination must be destroyed root and branch. But, in the absence of discriminatory results, the remedial process of the Act cannot be employed. Therefore, a court must find discriminatory harm before concluding that the Act has been violated.

The authoritative legislative history of the 1982 amendments to the Act sets forth a series of factors, such as discriminatory electoral practices and past societal discrimination, that must be considered in determining whether the Act has been violated. S. Rep. No. 94-417, 28-29 (1982), *reprinted in* 1982 *U.S. Code & Admin. News* 177, 206. Similarly, in *Gingles*, all the members of this Court, without regard to other disagreements, recognized the importance of careful application of the so-called Senate factors to the facts at hand. Application of the maximization standard renders the factual analysis—and the finding of discriminatory effect itself—irrelevant.[39]

Moreover, in this case, the necessary finding of discriminatory harm could not be made, even though the district court found racially polarized voting. That is because SJR 2-G protects Hispanics' right to vote in future elections. As explained above, SJR 2-G ensures that nine of the 18 Dade County House districts will contain majority Hispanic voting age populations, and each of the

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the court believed, Section 2 was violated even though no remedy better than SJR 2-G could be implemented. The court specifically held that assuring equal electoral opportunity and a fair allocation of political power for *all* Dade County ethnic populations bore only on the choice of a proper remedy. App. 63a, 66a.

[39] 478 U.S. at 44-45; *id.* at 98-99 (opinion of O'Connor, J.). At least four Justices in *Gingles* expressly rejected the principle that "undiluted minority voting strength means the maximum feasible minority voting strength," *Gingles* 478 U.S. at 89 (concurring opinion)—and no other opinion in *Gingles* endorsed the principle.

nine seats will permit the Hispanic population to participate effectively in the political process. Approximately 50% of the voting age population of Dade County is Hispanic. A voting plan that provides effective proportional representation cannot simultaneously pose discriminatory bars to political participation. That conclusion is compelled by the holding in *Gingles* that the Act is not violated where minority voters in a district can consistently elect representatives of their choice in proportion to minority population levels in the district. *See Gingles*, 478 U.S. at 77 (Brennan and White, JJ.) ("persistent proportional representation is inconsistent with [the] allegation that the ability of [minority] voters to elect candidates of their choice is not equal to that enjoyed by the White majority"); *id.*, at 102 (O'Connor, J., Burger, C.J., Rehnquist, J. (now C.J.), and Powell J.).[40]

Third, the decision below squarely conflicts with a recent ruling by a three-judge district court evaluating Missouri's 1992 state legislative reapportionment plan. *See Nash v. Blunt*, Civ. No. 91-0840-CV-W-2, 1992 WL 165162 (W.D. Mo. July 15 1992) (three-judge court).[41]

In *Nash*, the plaintiffs demonstrated political cohesion and polarized voting, and claimed a Section 2 violation because the State's plan did not draw all the minority districts that could have been drawn. The State of Mis-

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[40] In *Gingles*, the Court had the luxury of reviewing the outcomes of a number of elections conducted under the challenged plan and could find a pattern of consistent representation as a matter of historical fact. In this case, as in most cases, the court must project the likely outcomes of future elections. But that is only a matter of temporal perspective. The principle that consistent electoral success bars a challenge applies equally well where, as here, consistent electoral success can be easily forecast. Indeed, no plaintiff in the district court ever tried to contest the conclusion that the nine House districts in SJR 2-G are all "safe" Hispanic seats.

[41] The decision below also conflicts, at least in principle, with *Turner v. Arkansas*, 784 F. Supp. 553 (E.D. Ark. 1991) (three-judge court), *aff'd*, 112 S. Ct. 2296 (1992), and with a recent three-judge court decision in *Burton v. Sheheen*, 793 F. Supp. 1329 (D.S.C. May 1, 1992, *appeal filed*, 61 U.S.L.W. 3083 (July 21, 1992).

souri defended on the grounds that Section 2 does not require maximization of minority voting strength, and that the State's plan guaranteed minority voters the opportunity to elect candidates of choice in proportion to their population levels in relevant communities.

Nash held that "though the plaintiffs have proven more [minority] districts could have been drawn . . . this fact does not prove the . . . plan violates the Act." *Id.* at 7. The court noted that "[g]iven Congress' express statement that the Act does not require proportional representation, we do not believe Congress intended the Act to require maximum representation." *Id.* at 6. The court also held that proof of "persistent proportional representation" should defeat a Section 2 vote dilution claim. *Id.* at 7; *see also id.* at 16 (Sachs, J., concurring) (no Section 2 violation because "a contrary ruling would force redistricters to grant more than proportional representation" to minority population).

A proper understanding of Section 2 compels the conclusion that the *Nash* court is correct and that the court below is in error on this fundamental point. As demonstrated, when a reapportionment plan provides members of a protected class with an opportunity to elect representatives of their choice in numbers at least as great as the group's proportion of the relevant population, that plan presumptively cannot afford the protected class "less opportunity than other members of the electorate to . . . elect representatives of their choice." 42 U.S.C. § 1973(b).

In SJR 2-G, the Florida Legislature sought to achieve a fair allocation of political power among Dade County's diverse, and often contentious, ethnic and racial populations. *See United Jewish Organizations v. Carey*, 430 U.S. 144, 167 (1977) (opinion of White, J.). To that end, SJR 2-G ensures Hispanic voters in Dade County an opportunity at least equal to that of other members of the electorate to participate in the political process and

elect candidates of choice. The Voting Rights Act cannot reasonably be interpreted to require more.[42]

II. THIS COURT SHOULD DETERMINE WHETHER THE DISTRICT COURT'S RELIANCE ON THE VOTING AGE POPULATION RATHER THAN ON THE ELIGIBLE VOTER POPULATION TO DETERMINE THE NUMBER OF HISPANIC-MAJORITY DISTRICTS WHICH COULD HAVE BEEN DRAWN IN THE DADE COUNTY AREA WAS ERRONEOUS.

This case also raises substantial, unresolved questions respecting whether, and to what extent, Section 2 plaintiffs are permitted to demonstrate the violation of their voting rights by relying on the presence of others who, unlike the plaintiffs, are ineligible to vote. Because Section 2 claims often involve minority groups with significant numbers of noncitizen immigrants (who are generally ineligible even to register to vote), the need for a clear standard is manifest.

[42] Once a reapportionment plan has been shown to provide a minority population with "equal opportunity" in this sense, Section 2 permits a State to pursue legitimate state policies, including political balance, *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973); *Davis v. Bandemer*, 478 U.S. 109, 129 n.10 (1986), "respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives," *Karcher v. Daggett*, 462 U.S. 725, 740 (1983), and ensuring representation for communities of interest, *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977). *See generally Houston Lawyers Ass'n v. Attorney General of Texas*, 111 S. Ct. 2376, 2381 (1991). Nothing in Appellants' argument would treat as illegitimate a decision to create more minority districts than are required by Section 2.

For similar reasons, the district court's makeweight conclusion that SJR 2-G constituted "intentional discrimination" by preserving two incumbent seats is clearly erroneous both factually and as a matter of law. SJR 2-G has no discriminatory impact on Dade County Hispanics; the plan increases the number of Hispanic House districts from 7 to 9 and provides for at least proportional representation. Even if not every possible Hispanic district was drawn, many legislative choices in SJR 2-G favored Hispanic residents. As a matter of law, this evidence cannot support an inference of intentional racial discrimination. *See City of Mobile v. Bolden*, 446 U.S. 55, 72 and n.17 (1982) (plurality opinion).

Under *Thornburg v. Gingles*, a plaintiff must demonstrate that additional districts could have been drawn that would cure the alleged vote dilution. 478 U.S. at 47-52, nn.15, 16. This necessarily requires a court to define the population that is relevant to Voting Rights Act claims.

In this case the plaintiffs based their claim that additional Hispanic districts could have been created on the total Hispanic voting age population of Dade County. Defendants then introduced evidence showing that half of the Hispanic voting age population of Dade County are noncitizens[43] to contend, quite simply, that the presence (or absence) of persons ineligible to vote cannot have any bearing on whether the right to vote of eligible persons has been violated.

Plaintiffs made no effort to rebut this evidence. Instead, effectively conceding that they could not prove their case if citizenship were taken into account, plaintiffs argued that requiring a showing of voting strength based on eligible voters "cannot be the law in this country." Tr. VIII, 69 (statement of counsel for the United States). The district court agreed, ruling that "as a matter of law . . . the relevant inquiry . . . is voting age population," and that "citizenship is not important." Tr. V, 40, 47.

It is well established, however, that Section 2 vote dilution claims must be based on estimates of eligible minority voters. *See Romero v. City of Pomona*, 883 F.2d 1418 (9th Cir. 1989); *McNeil v. Springfield Park Dist.*, 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031

[43] Defendants introduced the expert demographic testimony of William DeGrove showing that substantial portions of the voting age Hispanic population consisted of noncitizens. Based on standard court-accepted bivariate regression analysis and recently released U.S. census data on Dade County citizenship levels, DeGrove adjusted voting age population figures for plaintiffs' districts on a district-by-district basis, and determined that Hispanic eligible voter levels fell below 50% in 8 of 11 of plaintiffs' proposed Hispanic majority districts. DeGrove Testimony, Tr. VII, 5-24, App. 187a-198a.

(1989); *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989). Indeed, on its face, Section 2 protects against "denial or abridgement of the right of *any citizen of the United States*," 42 U.S.C. § 1973(a) (emphasis added), and, therefore, the presence or absence of noncitizens can have no effect on the right of citizens to participate in the electoral process.

It is doubtless for this reason that, upon reflection, the district court's subsequent July 17 opinion offered a different rationale for its result. The court first noted plaintiffs' expert testimony showing that one district with a 59% Hispanic population had elected a Hispanic candidate, and then noted defendants' expert demographic testimony documenting that most of plaintiffs' proposed districts did not contain majority Hispanic *citizen* voting age populations. The court then concluded that it need not resolve the evidentiary conflict: "because each of the [plaintiffs' 11 proposed] districts contains a 60% Hispanic VAP and, therefore, 'satisfies' the 65 percent rule, the court need not further inquire as to the Hispanic citizenship levels in each proposed district." App. 40a. In so holding, the court confused the manner of finding liability with the manner of remedying established violations.

The "65 percent rule" cited by the district court is a benchmark for drawing effective minority districts in a *remedial plan*. *See Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). To account for a minority community's generally younger median population age, lower voter registration patterns, and lower voter turnout, the "65 percent rule" suggested that remedial plans should draw districts containing a 65% minority population to assure their effectiveness. *Id.* at 1415. Where, as here, voting age population figures are used, the number drops to 60% because median age differences are reflected in the voting age statistics. The district court's reliance on this remedial rule to *resolve* a Section 2 challenge warrants review for at least four reasons.

First, by using the "65 percent rule" as a presumption for establishing Section 2 liability, the district court's ruling conflicts with the clear weight of federal authority. In *Dickinson v. Indiana State Election Bd.*, 933 F.2d 497 (7th Cir. 1991), for example, the Seventh Circuit explicitly rejected the validity of any such rule as a tool for evaluating a Section 2 vote dilution challenge. *Id.* at 503. Similarly, in *Magnolia Bar Ass'n, Inc. v. Lee*, Civ. No. J90-0413, 1992 WL 164580 (S.D. Miss. July 15, 1992), the court also rejected the applicability of this rule: "The 65 percent guideline does not factor into a Section 2 determination of liability." *Id.*, slip op. at *6. *See also Nerch v. Mitchell*, 3:CV-92-0095 (M.D. Pa. Aug. 13, 1992); *Harrison v. Pennsylvania Legislative Reapportionment Commission*, Civ. No. 92-6063, 1992 WL 95090 (E.D. Pa. April 21, 1992); *McDaniels v. Mehfoud*, 702 F. Supp. 588, 592 (E.D. Va. 1988), *appeal dismissed*, 927 F.2d 596 (4th Cir. 1991). *But see Illinois Legislative Redistricting v. LaPaille*, 786 F. Supp. 704, 714-15 (N.D. Ill. 1992) (three-judge court). As these courts recognized, the "65 percent rule" comes into play only *after* a plan has been found to violate Section 2; it does not establish whether Section 2 has been violated.

Second, the 60% figure is not a useful—much less determinative—guide to whether a group has equal electoral opportunity. As the example in footnote 37 *supra* illustrates, it is possible for a group with 38% of the population to constitute 60% of the population in three of five districts.

Third, the district court's ruling conflicts with the command of *Gingles* that plaintiffs prove Section 2 vote dilution claims with district-specific evidence. Vote dilution challenges require an "intensely local appraisal," *Thornburg v. Gingles*, 478 U.S. at 78 (quotation omitted), and, as this Court made clear, "courts must not *rely* on data aggregated from all the challenged districts." 478 U.S. at 60 n.28 (emphasis in original).

Fourth, *Ketchum v. Byrne* made clear that—even in the remedial context— the "65 percent rule" is merely

a judicial device to be used when actual data is unavailable. 740 F.2d at 1415. *Accord Nash v. Blunt*, slip op. at *8. Here, defendants introduced actual data demonstrating that eligible Hispanic voting age population would constitute a majority, and would be able to elect candidates of choice in only 3 of the 11 districts proposed by plaintiffs. Thus, even if the "65 percent rule" were a proper guide to determining liability—and it is not—it would not suffice in this case. The district court's refusal to consider Appellants' actual data effectively elevated the "65 percent rule" into an irrebuttable presumption of liability."[44]

III. EVEN IF THIS COURT DETERMINES THAT THE LOWER COURT'S LIABILITY FINDINGS SHOULD NOT BE DISTURBED, THE REMEDY IMPOSED BY THE DISTRICT COURT SHOULD STILL BE VACATED.

The remedial proceedings also present substantial questions warranting plenary consideration or summary reversal.

The district court's decision conflicts directly with *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981), and *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978). As these decisions make plain, "even after a federal court has found a districting plan unconstitutional, 'redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt.'" *McDaniel*, 452 U.S. at 150 n.30 (quoting *Wise*, 437 U.S. at 539). After finding an existing plan invalid, a court must "give the legislature an opportunity

---

[44] A presumption establishes a rule that "the establishment of fact B is sufficient to satisfy a party's burden of producing evidence with regard to fact A." McCormick, *Evidence* § 342 at 965 (1984). Accordingly, "a presumption is rebutted upon the introduction of evidence which would [directly] support the non-existence of the presumed fact." *In re Yoder Co.*, 758 F.2d 1114, 1119-20 (6th Cir. 1985) (quotation omitted). Once rebutted, a presumption has no evidentiary effect. *See id. Cf. Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

to devise an acceptable replacement before itself undertaking the task of reapportionment." *Id.* In this case, the district court never gave Appellants that opportunity. Instead, the court summarily ordered imposition of the modified De Grandy plan.[45]

The district court's remedial order also conflicts with *Upham v. Seamon*, 456 U.S. 37 (1982). As *Upham* makes clear, core principles of federalism require that a "district court's modifications of a state plan [be] limited to those necessary to cure any constitutional or statutory defect," 456 U.S. at 43, and must "defer to the legislative judgments the [original] plan[] reflect[s] *to the maximum extent feasible*." *Id.* at 40-41 (emphasis in original); *see also White v. Weiser*, 412 U.S. 783, 795 (1973). Thus, a federally imposed remedy must leave state-drawn districts in place to the maximum extent consistent with an effective remedy.

The remedial order imposed by the district court flies in the face of these principles. To create two additional Hispanic majority districts in Dade County, the modified De Grandy plan substantially reconfigures all *31* House districts in South Florida. The remedial plan reaches far beyond Dade County, and reshapes districts in areas that were not at issue in this case and for which no evidence of a Section 2 violation was submitted.[46]

The court's remedial order also trenches unnecessarily on a host of other important state policies. By altering the boundaries of House districts far beyond the area of the alleged Section 2 violation, the remedial plan unnecessarily ignores the important traditional boundary between Dade and Broward counties, and other traditional

[45] This Court has noted probable jurisdiction in *Voinovich v. Quilter*, 112 S. Ct. 2299 (1992), which raises similar questions with respect to the federal court's remedial authority.

[46] *See* Affidavit of George H. Meier, July 2, 1992, at 2, Exhibit 2 to House Defendants' Motion For Reconsideration. App. 152a-153a. Maps have been lodged with the Clerk of the Court which illustrate the differences between SJR 2-G and the modified De Grandy plan.

political divisions that SJR 2-G sought to preserve.[47] The plan fractures traditional Jewish communities of interest in the Dade County area that SJR 2-G was careful to preserve.[48] The plan also has significant adverse consequences for African American voters, many more of whom will be submerged in Hispanic majority districts under the court's plan. Finally, the plan amounts to a partisan gerrymander that significantly changes the political balance in the State.[49]

Furthermore, the district court's remedial proceeding was so irregular that summary invalidation is warranted irrespective of whether this Court concludes that the case presents issues warranting plenary consideration. Appellants were afforded no opportunity to evaluate the plaintiffs' proposed remedial plan prior to the proceeding, and thus had no basis for demonstrating at trial the extent to which the modified De Grandy plan jeopardized the state objectives embodied in SJR 2-G.

The court's remedial "findings," moreover, lacked any evidentiary support. Though the court concluded that the modified De Grandy plan minimized disruption of legitimate state policies, that conclusion rested entirely on what the court described as the "testimony" of plaintiff De Grandy. App. 154a. During the remedial proceedings, however, Representative De Grandy did not testify; his statements were unsworn and were not subject to cross-examination. Thus, his "testimony" was not evidence and could not provide a proper foundation for the district court's remedial ruling.

For these reasons, summary reversal of the district court's remedy is required.

[47] *See* Logan Testimony, Tr. VII, 81-84, 89-90, 93-94; Wallace Testimony, Tr. VII 165, 166 ("the sentiment on both sides of that county line was to try to respect the integrity of that boundary").

[48] *See* Tr. VIII, 118-121 (statement by counsel for *amici* with respect to the effect of plaintiffs' proposed remedies on traditional Jewish communities).

[49] Affidavit of Kimball Brace, July 2, 1992, Exhibit 1 to House Defendants' Motion for Reconsideration, App. 154a-156a.

IV. THE DISTRICT COURT'S REFUSAL TO ABSTAIN CONFLICTS WITH THE RECENT RULING OF A THREE-JUDGE COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, WHICH ABSTAINED UNDER CIRCUMSTANCES IDENTICAL TO THOSE PRESENT HERE, AND RAISES IMPORTANT ISSUES OF FEDERALISM AND STATE SOVEREIGNTY.

The district court declined to abstain from deciding plaintiffs' Section 2 challenges to SJR 2-G, notwithstanding that the De Grandy plaintiffs: (i) raised the identical claims first in a proceeding before the Florida Supreme Court and demanded that the court take jurisdiction over the claims; (ii) obtained the ruling they requested; and (iii) ignored the state court's offer of further consideration after a full evidentiary hearing.

The district court's ruling on the abstention issue, which was never explained in any written opinion, conflicts directly with a recent ruling of the three-judge United States District Court for the Northern District of California in *Members of the California Democratic Congressional Delegation v. Eu*, 790 F. Supp. 925 (N.D. Cal. 1992). In that case, a group of plaintiffs brought constitutional and Voting Rights Act challenges to California's redistricting plan. The same plaintiffs had also raised the same challenges in a concurrent proceeding before the California Supreme Court. The *Eu* court held that abstention was required, and dismissed the federal claims. 790 F. Supp. at 933.

This direct conflict is illustrative of widespread uncertainty as to the proper relationship between federal and state courts of concurrent jurisdiction adjudicating challenges to state reapportionment plans. The Court's decision to note probable jurisdiction in *Growe v. Emison*, 112 S. Ct. 155 (1992), also points up the need for guidance in this area.

A proper understanding of the demands of comity—as adumbrated in *Younger v. Harris*, 401 U.S. 37, 44 (1971), and its progeny—compels abstention here. In

Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982), the Court established that *Younger* abstention is appropriate in deference to ongoing state civil proceedings that implicate important state interests and provide adequate opportunity to raise federal claims. *Id.* at 432.

In this case, the De Grandy plaintiffs expressly demanded that the Florida Supreme Court adjudicate their Section 2 challenges to SJR 2-G.[50] The Florida Supreme Court acceded; issued a ruling rejecting the claims; retained jurisdiction, and presented the opportunity for further consideration based on a full evidentiary record. Only after this unfavorable result did the De Grandy plaintiffs seek a federal forum.

A more unseemly, calculated affront is difficult to imagine. Under the circumstances, the State's interest in adjudicating the Voting Rights Act challenges to SJR 2-G raised by the De Grandy plaintiffs, which go to the core of state sovereignty, is plainly "so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil v. Texaco*, 481 U.S. 1, 11 (1987); *see also Scott v. Germano*, 381 U.S. 407 (1965) (per curiam).[51]

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[50] State courts—which have been given concurrent jurisdiction to determine Voting Rights Act claims—are fully competent to adjudicate any issues of federal law that may arise in challenges to legislative redictricting. *Hathorn v. Lovorn*, 457 U.S. 255, 265-70 (1982).

[51] A substantial question is also present with respect to whether the Section 2 claims of the De Grandy plaintiffs should have been barred by *res judicata*. The De Grandy plaintiffs were parties to the action in which the Florida Supreme Court ruled that SJR 2-G complies with Section 2. Under Florida law, the state supreme court's action precludes any further litigation of challenges to the plan. *See* Fla. Const. Art. III, § 16(d); *Florida ex. rel. Landis v. Thompson*, 163 So. 270 (Fla. 1935).

Indeed, the instant case is on all fours with *Growe v. Emison*, where the Minnesota Supreme Court provided an opportunity for consideration of Section 2 challenges to a reapportionment plan,

CONCLUSION

The Court should note probable jurisdiction of this appeal. In the alternative, the July 2, 1992 judgment of the district court should be summarily reversed.

Respectfully submitted,

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and the plaintiffs determined not to avail themselves of the opportunity. The preclusive effect of the Minnesota Supreme Court's ruling is one of the issues under plenary consideration in *Growe*.

92-519

No.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

T. K. WETHERELL, Speaker of the Florida House of Representatives, PETER R. WALLACE, Chairman of the Reapportionment Committee of the Florida House of Representatives, LAWTON CHILES, Governor of the State of Florida, ROBERT A. BUTTERWORTH, Attorney General of the State of Florida, and JIM SMITH, Secretary of State of the State of Florida,

Appellants,

v.

MIGUEL DE GRANDY, MARIO DIAZ-BALART, ANDY IRELAND, CASIMER SMERICKI, VAN B. POOLE, TERRY KETCHEL, ROBERTO CASAS, RODOLFO GARCIA, JR., LUIS ROJAS, LINCOLN DIAZ-BALART, JAVIER SOUTO, JUSTO LUIS POSO, ALBERTO CARDENAS, REY VELAZQUEZ, LUIS MORSE, ALBERTO GUTMAN, KAREN E. BUTLER, SGT. AUGUSTA CARTER, JEAN VAN METER, ANNA M. PINELLAS, ROBERT WOODY, GINA HAHN, BILL PETERSEN, TERRY KESTER, MARGIE KINCAID and BROOKS WHITE and the UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Northern District of Florida

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APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TCA 92-40015-WS

MIGUEL DE GRANDY, *et al.*,
Plaintiffs,

and

GWEN HUMPHREY, *et al.*,
Plaintiffs-Intervenors

v.

T.K. WETHERELL, *et al.*,
Defendants.

TCA 92-40131-WS

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, *et al.*,
Plaintiffs,

v.

LAWTON CHILES, *et al.*,
Defendants.

TCA 92-40220-WS

UNITED STATES OF AMERICA,
Plaintiffs,

v.

STATE OF FLORIDA, *et al.*,
Defendants.

JUDGMENT

[Filed Jul. 2, 1992]

Before HATCHETT, Circuit Judge, STAFFORD and VINSON, District Judges

BY THE COURT

It is ORDERED, ADJUDGED, and DECREED as follows:

1. The state of Florida's house of representative districts embodied in Senate Joint Resolution 2-G as validated by the Florida Supreme Court on May 13, 1992, violate Section 2 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973, et seq.).

5. The Court adopts plan 268, the Modified De Grandy House of Representatives Plan as the plan to be utilized in the 1992 Florida State House of Representatives elections and in Florida State House of Representatives elections thereafter. This plan shall henceforth be referred to as the "1992 Florida House Plan";

6. The defendants, individually, and their successors, agents, employees, attorneys, and persons acting in concert or in participation with them shall:

(a) conduct elections for the Florida House of Representatives in 1992 in accordance with the redistricting plan this court has adopted called the "1992 Florida House Plan," a map and written description of which will be filed as a supplement to this Judgment;

(b) conduct elections for the Florida House of Representatives in years after 1992 in accordance with the 1992 Florida House Plan.

DONE AND ORDERED this 2nd day of July, 1992.

/s/ Joseph W. Hatchett
JOSEPH W. HATCHETT
United States Circuit Judge

/s/ William Stafford
WILLIAM STAFFORD
United States District Judge

/s/ Roger Vinson
ROGER VINSON
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TCA 92-40015-WS

MIGUEL DE GRANDY, *et al.*,
Plaintiffs,

and

GWEN HUMPHREY, *et al.*,
Plaintiffs-Intervenors

v.

T.K. WETHERELL, *et al.*,
Defendants.

TCA 92-40131-WS

FLORIDA STATE CONFERENCE OF
NAACP BRANCHES, *et al.*,
Plaintiffs,

v.

LAWTON CHILES, *et al.*,
Defendants.

TCA 92-40220-WS

UNITED STATES OF AMERICA,
Plaintiffs,

v.

STATE OF FLORIDA, *et al.*,
Defendants.

JUDGMENT

[Filed Jul. 2, 1992]

Before HATCHETT, Circuit Judge, STAFFORD and VINSON, District Judges

BY THE COURT

It is ORDERED, ADJUDGED, and DECREED as follows:

1. The state of Florida's state senatorial districts embodied in Senate Joint Resolution 2-G, as modified by the Florida Supreme Court on June 25, 1992 ["1992 Florida Senate Plan"] do not violate Section 5 of the Voting Rights Act of 1965, as amended, (42 U.S.C. § 1973 et seq.).

2. The court adopts the 1992 Florida Senate Plan as the plan to be utilized in the 1992 Florida State Senate elections and in Florida State Senate Elections thereafter.

3. The state of Florida's state senatorial districts embodied in the 1992 Florida Senate Plan to do not violate Section 2 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973 et seq.).

3. The defendants, individually, and their successors, agents, employees, attorneys, and persons acting in concert or in participation with them shall:

(a) conduct state senatorial elections in 1992 in accordance with the 1992 Florida Senate Plan, a map and written description of which are attached to this Judgment;

(b) conduct state senatorial elections in years after 1992 in accordance with the 1992 Florida Senate Plan.

DONE AND ORDERED this 2nd day of July, 1992.

/s/ Joseph W. Hatchett
JOSEPH W. HATCHETT
United States Circuit Judge

/s/ William Stafford
WILLIAM STAFFORD
United States District Judge

/s/ Roger Vinson
ROGER VINSON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TCA 92-40015-WS

MIGUEL DE GRANDY, MARIO DIAZ-BALART, ANDY IRELAND, CASIMER SMERICKI, VAN B. POOLE, TERRY KETCHEL, ROBERTO CASAS, RODOLFO GARCIA, JR., LUIS ROJAS, LINCOLN DIAZ-BALART, JAVIER SOUTO, JUSTO LUIS POSO, ALBERTO CARDENAS, REY VELAZQUEZ, LUIS MORSE, ALBERTO GUTMAN, KAREN E. BUTLER, SGT. AUGUSTA CARTER, JEAN VAN METER, ANNA M. PINELLAS, ROBERT WOODY, GINA HAHN, BILL PETERSEN, TERRY KESTER, MARGIE KINCAID, and BROOKS WHITE,

Plaintiffs,

v.

T.K. WETHERELL, in his official capacity as Speaker of the Florida House of Representatives, GWEN MARGOLIS, in her official capacity as President of the Florida Senate, LAWTON CHILES, in his official capacity as Governor of the State of Florida, JACK GORDON, in his official capacity as Chairman of the Senate Reapportionment Committee, PETER R. WALLACE, in his official capacity as Chairman of the House Reapportionment Committee, JIM SMITH, in his official capacity as Secretary of State of Florida, ROBERT BUTTERWORTH, in his official capacity as Attorney General of Florida,

Defendants.

TCA-No. 92-40131-WS

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, T. H. POOLE, SR., WHITFIELD JENKINS, LEON W. RUSSELL, WILLYE DENNIS, TURNER CLAYTON, RUFUS BROOKS, VICTOR HART, KERNA ILES, ROOSEVELT WALTERS, JOHNNIE MCMILLIAN, PHYLLIS BERRY, MARY A. PEARSON, MABLE BUTLER, IRIS WILSON, JEFF WHIGHAM, AL DAVIS, PEGGY DEMON, CARLTON MOORE, RICHARD POWELL, NEIL ADAMS, LESLIE MCDERMOTT, ROBERT SAUNDERS, SR., IRV MINNEY, ADA MOORE, ANITA DAVIS, and CALVIN BARNES,

Plaintiffs,

v.

LAWTON CHILES, in his official capacity as Governor of Florida, JIM SMITH, in his official capacity as Secretary of State of Florida, ROBERT BUTTERWORTH, in his official capacity as Attorney General of Florida, GWEN MARGOLIS, in her official capacity as President of the Florida Senate, T. K. WETHERELL, in his official capacity as Speaker of the Florida House of Representatives, JACK GORDON, in his official capacity as Chairperson of the House Reapportionment Committee, and PETER R. WALLACE, in his official capacity as Chairman of the House Reapportionment Committee,

Defendants.

TCA-No. 92-40220-WS

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF FLORIDA, a State of the United States; T. K. WETHERELL, Speaker of the Florida House of Representatives; GWEN MARGOLIS, President of the Florida Senate; LAWTON CHILES, Governor of the State of Florida; ROBERT BUTTERWORTH, Attorney General for the State of Florida; PETER R. WALLACE, Chairman of the House Reapportionment Committee; JACK GORDON, Chairman of the Senate Reapportionment Committee; JIM SMITH, Secretary of State for the State of Florida,

Defendants.

[Filed Jul. 17, 1992]

Before HATCHETT, Circuit Judge, STAFFORD and VINSON, District Judges.

I. PROCEDURAL HISTORY

Florida currently has forty Senate districts and one hundred twenty House of Representative districts. These districts were created in 1982 and are currently malapportioned. According to the 1990 census data, the total population of the state of Florida is 12,937,926 persons. Between the census of 1980 and 1990, Florida's population increased 3,213,602 persons. To achieve equality between Florida's forty Senate districts, each district would ideally contain 323,448 persons. To achieve equality between Florida's one hundred twenty House districts, each district would ideally contain 107,816 persons.

On the opening day of the 1992 Florida legislative session, Miguel De Grandy, a member of the Florida House of Representatives, and other registered voters ("De Grandy plaintiffs") filed a complaint against the Speaker of the Florida House of Representatives, the President of the Florida Senate, the Governor of Florida, and other state officials. The De Grandy plaintiffs filed the complaint in this court challenging the constitutionality of Florida's current congressional and state legislative districts. The De Grandy plaintiffs alleged that the current districts violate both the Equal Protection Clause of the United States Constitution and the Voting Rights

Act of 1965, as amended, and urged this court to assert jurisdiction in order to redistrict and reapportion the state.

The De Grandy plaintiffs filed a first amended complaint on January 23, 1992. The defendants moved to dismiss the complaint. After hearing arguments on the motion, the court dismissed the action without prejudice for lack of subject matter jurisdiction (document 41). On March 9, 1992, the De Grandy plaintiffs filed a second amended complaint (document 44) alleging violations of Article I, Section 2 of and the Fourteenth and Fifteenth Amendments to the United States Constitution as well as violations of Sections 2 and 5 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973 et seq.

In short, Count I alleged that the present Florida House and Senate districts were unconstitutional inasmuch as they violated the Equal Protection Clause of the Fourteenth Amendment, Article I, Section 2 of the United States Constitution and the "one-person, one-vote" principle. Count II alleged that because these districts diluted the voting strength of minority voters, they violated the Voting Rights Act of 1965, as amended. Count III alleged that the Florida Legislature was at an impasse in adoption of state redistricting plans. Counts V and VI alleged that the time lines for redistricting set forth in Article III, Section 16 of the Florida Constitution, in conjunction with the preclearance requirements of Section 5 of the Voting Rights Act, "permit the adoption and implementation of new district lines to take place so late in the year after the decennial census" that they result in a deprivation of plaintiffs' right to participate in the 1992 elections on a fair and equal basis.[1] Document 44 at ¶ 120.

[1] Article 3, Section 16(a) of the Florida Constitution provides that:

> *Senatorial and representative districts.* The legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state in accordance with the constitution of the state and of the United States into not less than thirty nor more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory, and into not less than eighty nor more than one hundred twenty consecutively numbered representative districts of either contiguous, overlapping or identical territory.

If the legislature should fail at its regular session to apportion themselves into the legislative districts as required by Article 3, Section 16, the governor is required to reconvene the legislature within thirty days in a special apportionment session not to exceed thirty consecutive days. Fla. Const. Art. 3 § 16(a). During this time, no other business shall be transacted and it shall be the mandatory duty of the legislature to adopt a joint resolution. Fla. Const. Art. 3 § 16(a). If the legislature adopts a reapportionment plan, the constitution requires the attorney general to petition the Florida Supreme Court for a declaratory judgment determining the validity of the apportionment. Fla. Const. Art. 3 § 16(c). The Supreme Court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment.

If the Supreme Court determines that the apportionment made by the legislature is invalid, the governor shall reconvene the legislature within five days thereafter in an extraordinary apportionment session which shall not exceed fifteen days, during which the legislature shall adopt a joint resolution of apportionment conforming to the judgment of the Supreme Court. Fla. Const. Art. 3 § 16(d). If the Supreme Court determines that the legislative apportionment is valid, the plan must be precleared by the Department of Justice before it may be considered validly enacted. Until the plan is precleared, it may not be used in any election.

The Florida constitution is silent as to what occurs if the Department of Justice fails to preclear a plan previously validated by the Supreme Court. In its order dated May 13, 1992, the Florida Supreme Court explicitly "retain[ed] exclusive state jurisdiction to consider any and all future proceedings relating to the validity of this apportionment plan." *In re: Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, No. 79-674, slip op. at 23 (Fla. May 13, 1992).

Count V alleged a facial challenge, while Count VI alleged an "as applied" challenge. Count VII alleged that certain defendants have "intentionally misused the time lines and procedures found in Article III . . . to delay the redistricting process to the advantage of white incumbents and to

the detriment of voters and would be challengers to those incumbents. Document 44 at ¶ 130. On March 13, 1992, the Florida legislature ended its regular session without adopting a state reapportionment plan.

On March 27, 1992, this three-judge court convened, denied all motions to dismiss and established an expedited schedule for adoption of congressional and state legislative plans by May 29, 1992 (document 56). That scheduling order in no way enjoined or prevented state redistricting and reapportionment agencies from attempting to enact their own plans. On April 2, 1992, the Governor of Florida, called a special redistricting and reapportionment session of the Florida Legislature pursuant to Article III, Section 16(a), of the Florida Constitution. On April 10, 1992, the legislature adopted Senate Joint Resolution 2-G reapportioning state House and Senate districts.

Meanwhile, this case progressed and on April 6, 1992, the court appointed a special master pursuant to Fed.R. Civ.P. 53 for both Congressional and legislative reapportionment. On April 7, 1992, the court consolidated this case with a similar lawsuit filed by the Florida State Conference of the NAACP Branches and many individual African-American voters. The court also granted other persons and organizations leave to intervene or act as amicus curiae.[2] On April 17, 1992, the Attorney General of the State of Florida submitted Senate Joint Resolution

[2] Those acting as amici are Simon Ferro, State Chairman of the Florida Democratic Party; Common Cause; Florida AFL-CIO; United States Representative Craig James; the Cuban American Bar Association; The Coalition of Hispanic Women; and State Representative Daniel Webster. Plaintiff-intervenors include Gwen Humphrey, Vivian Kelly, Gene Adams, Wilmateen W. Chandler, Dr. Percy L. Goodman, Jesse L. Nipper, Moease Smith, and Carolyn L. William ["Humphrey Intervenors" or "plaintiffs"]; State Representatives Darryl Reaves, Corinne Brown and James T. Hargrett ["Reaves-Brown" or "plaintiffs"], United States Representative Jim Bacchus; and United States Representative Andy Ireland. State Representative Alzo Reddick is a defendant-intervenor.

2-G concerning state legislative reapportionment to the United States Department of Justice (DOJ) for preclearance pursuant to Section 5 of the Voting Rights Act. That same day, this court issued an order bifurcating the congressional redistricting and state reapportionment hearings. The special master promptly concluded his hearings on congressional redistricting and issued his report and recommendation. This court considered the parties objections, conducted a hearing and issued its judgment on May 29, 1992 (document 439).

On May 13, 1992, the Florida Supreme Court validated Senate Joint Resolution 2-G. As a result of the validation, this court stayed proceedings related to state reapportionment until May 27, 1992. A hearing was held on May 27, 1992 at which time the court considered all pending motions.[3] At the hearing, the court granted the government's motion to be dismissed as a party to the litigation, but invited comments from J. Gerald Hebert of the United States DOJ. Mr. Hebert advised the court that the Justice Department would probably issue its decision by June 17, 1992 as to whether the House and Senate plans would be precleared. All other motions were denied, and the stay of legislative reapportionment was continued.

On June 16, 1992, the DOJ issued its preclearance decision, noting that its review and determination addressed the plans only insofar as the five preclearance counties were affected. Exhibit 1 to document 447. The Attorney

[3] The motions included the Attorney General's Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Upon Which Relief Can Be Granted (document 363), an Application for Preliminary Injunction Against Implementation of SJR 2-G filed by the Humphrey intervenors (document 390), a Motion for Temporary Restraining Order and Preliminary Injunction (document 391) and a Motion to Lift Stay, Establish Scheduling Order and Set Trial on Legislative Redistricting (document 416) filed by the DeGrandy plaintiffs (document 416) and a Motion to Dismiss and for Injunctive Relief filed by the defendants' (document 426).

General of the United States did not interpose any objection to the Florida House of Representatives redistricting plan. The DOJ refused to preclear the Senate plan stating:

> We are unable to reach the same conclusion with regard to the Senate redistricting plan. With regard to the Hillsborough County area, the state has chosen to draw its senatorial districts such that there are no districts in which minority persons constitute a majority of the voting age population. To accomplish this result, the state chose to divide the politically cohesive minority populations in the Tampa and St. Petersburg areas. Alternative plans were presented to the legislature uniting the Tampa and St. Petersburg minority populations in order to provide minority voters an effective opportunity to elect their preferred candidate to the State Senate. . . . [T]he information before us, including the economic and other ties between Tampa and St. Petersburg, as well as the political cohesiveness of minority voters in those two cities, demonstrates that the two areas do share a commonality of interest. Finally, we have examined evidence, including evidence in the legislative record, which suggests that the state's approach to senatorial redistricting in the Hillsborough area was undertaken with an intent to protect incumbents. Such a rationale, of course, cannot justify the treatment of minority voters in this area by the State Senate plan.

Exhibit 1 to document 447 at 2-3.

Plaintiffs immediately filed a Renewed and Expedited Motion to Lift Stay, Establish Scheduling Order, and Set Trial on Legislative Redistricting (document 444) and a Motion for Leave to File Third Amended Complaint (document 448). The latter was granted and in their third amended complaint, plaintiffs added a count alleging that the 1992 joint resolution of apportionment

violated Section 2 of the Voting Rights Act. On June 18, 1992, the court issued a scheduling order and set a hearing on all pending motions for June 26, 1992 (document 449).

The Florida Supreme Court set an expedited schedule to address the DOJ's objection to the Senate plan. In its order dated June 17, 1992, the Supreme Court encouraged the legislature to adopt a proper reapportionment plan, taking into consideration the objections of the Justice Department. *See* Exhibit A to document 462 at 2. The order continued: "In the event the Legislature declares its inability to adopt a reapportionment plan or fails to adopt a plan by June 24, 1992, this Court will conclude that a legislative impasse has occurred, and this Court will promptly undertake to make such reapportionment." The court also set forth an abbreviated time frame within which action must be taken.[4]

In a letter dated June 18, 1992, the Speaker of the House (defendant Wetherell) and President of the Senate (defendant Margolis) advised the Supreme Court of their decision not to convene their respective Houses in an extraordinary apportionment session. *See* Exhibit A to document 478. The court was also advised that the Governor did not intend to convene the legislature in an extraordinary apportionment session. Exhibit A to document 478. In an order dated June 17, 1992, the Florida

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[4] "[A]ll interested parties are advised that they may file with this Court pertinent briefs and proposed alternate plans by no later than the following, whichever occurs first:

(a) two days after the Legislature's adoption of a reapportionment plan;

(b) two days after the Legislature's declaration of an inability to adopt a reapportionment plan; or

(c) June 26, 1992.

Exhibit A to document 462 at 2.

Supreme Court declared a legislative impasse and adopted an amended schedule.[5]

Jurisdictional questions were raised both in this court and in the Florida Supreme Court. The De Grandy plaintiffs filed their action in this court on January 14, 1992, and have continually asserted that jurisdiction to correct the Department's Section 5 objection lies only in this court. The Florida Supreme Court, however, without discussing the propriety of concurrent federal jurisdiction, held that

> [T]he reapportionment of state legislative bodies is not a power delegated by the Constitution of the United States to the federal government. Under the provisions of the Tenth Amendment to the United States Constitution, this is a power reserved to states. Of course, this Court is obligated to apply any applicable federal constitutional provisions and any federal statutes implementing these provisions.
>
> The Florida Constitution places upon this Court the responsibility to review state legislative reapportionment, Art. III, § 16, Fla. Const. Pursuant to that authority, we approved the original legislative reapportionment and retained jurisdiction to entertain subsequent objections thereto. Consistent with the provisions of article III, section 16 of the Florida Constitution, we believe that it is our obligation to redraw the plan to satisfy the objection of the Justice Department now that the Legislature has declared that it is not going to do so.

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[5] By that order, each interested person was permitted to submit by noon, June 22, 1992, a proposed correction to modify the redistricting plan for the Florida Senate so as to resolve the specific objection outlined by the United States Department of Justice in senate districts affecting Hillsborough County. Furthermore, each interested person was permitted to submit by noon, June 23, 1992, a report analyzing and comparing the merits of any proposal.

In Re: Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992, No. 79,674, slip. op. at 2-3 (Fla. June 25, 1992) (document 491). Defendants have consistently maintained that because Article III, Section 16 of the Florida Constitution specifically conferred jurisdiction over legislative redistricting to the Florida Supreme Court, this court should abstain in deference to the principles of comity and federalism. This court has declined the invitation to abstain.

On June 25, 1992, the Florida Supreme Court adopted a Senate redistricting plan which it felt complied with the DOJ's objection to Hillsborough County. After reviewing the six submitted plans, the Supreme Court adopted the plan submitted by Gwen Humphrey, et al., and supported by Representatitve Darryl Reaves, et al. ["Humphrey-Reaves plan"]. *Constitutionality of SJR-2G*, No. 79,674, slip. op. at 5. Chief Justice Shaw wrote separately to indicate his opinion that the overall plan—including the present revision—does not comply with Section 2 of the Voting Rights Act:

> Because this Court's review in the present proceeding is limited in scope to DOJ's section 5 preclearance inquiry, I concur in the majority opinion. I believe the present revision in the plan meets the objection evinced in DOJ's admittedly restricted review. I write to note, however, that I still conclude that the overall plan, including the present revision, fails under Section 2 of the Act because it does not provide an equal opportunity for minorities to elect representatives of their choice to the Florida legislature, as noted in my earlier dissent.

Constitutionality of SJR-2G, No. 79,674, slip. op. at 11 (Shaw, C.J. specially concurring).

The focus of this litigation has continually shifted. Plaintiffs' first amended complaint alleged that the delay inherent in Article III, Section 16 of the Florida Con-

stitution (and the fact that the legislature was not expected to pass a reapportionment plan in time for the scheduled 1992 elections) resulted in an unconstitutional intrusion in a citizen's right to vote. When the legislature passed SJR-2G, plaintiffs asserted that this plan would not be precleared by the DOJ, and then when the Senate plan was, indeed, not precleared, plaintiffs asked this court to adopt a plan which complied with Section 5 of the Voting Rights Act.

On June 23, 1992, the DOJ filed in this court its own lawsuit [6] against the State of Florida and several elected officials alleging that (1) the redistricting plans for the members of the Florida Legislature dilute the voting strength of African-American and Hispanic citizens in several areas of the state in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, et seq. and (2) the state's proposed Senate plan in the Hillsborough County area divides the politically cohesive minority populations in the Tampa and St. Petersburg areas such that there are no senatorial districts in which minority persons constitute a majority of the voting age population.[7] The

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[6] *United States v. State of Florida*, et al., TCA 92-40220-WS.

[7] This lawsuit was not entirely unexpected, for in its letter refusing to preclear the Florida Senate plan, the Justice Department indicated its belief that both the Senate and House plan contained Section 2 violations:

> Finally, we understand that there are challenges under Section 2 of the Voting Rights Act presently being considered in the consolidated cases of *De Grandy v. Wetherell*, No. 92-40015-WS and *Florida State Conference of NAACP Branches v. Chiles*, No. 92-40131-WS (N.D.Fla.). In addition, some of the comments we received alluded to various concerns involving the adequacy of the plans in non-covered counties. Because our review of these plans is limited by law to the direct impact on geographic areas covered by Section 5, we did not undertake to assess the lawfulness of the legislative choices outside of Collier, Hardee, Hendry, Hillsborough and Monroe counties. We do note, however, that allegations have been raised regarding dilution of minority covered jurisdictions, for example in the

De Grandy plaintiffs were also permitted to amend their complaint to allege Section 2 violations in both the House and Senate plans. *See* document 448.[8] On June 26, 1992, this court commenced its hearing on legislative reapportionment. At the outset, the court ruled on several pending motions [9] and heard argument on the others. After argument, the court granted Alberto R. Cardenas' and Alan K. Fortel's Motions for Leave to Appear Pro Hac Vice (documents 482 and 483) and the United States' Motion to Consolidate its lawsuit into the pending litigation (document 2).[10] The court also denied as moot Defendant Wetherell's and Margolis' Motions to Quash Subpoena (documents 485 and 487), and denied Plaintiffs' Motion to Strike Proposed State Senate Redistricting Plans Submitted by Margolis and Wetherell (document

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> Pensacola-Escambia County area and the Dade County area. Because these and other legislative choices did not directly impact upon the five covered counties, they cannot be the basis of withholding preclearance of either plan.

Exhibit 1 to document 447 at 6.

Because the Department's "preclearance" jurisdiction is limited to reviewing Florida's five covered counties, it could not reject either the House or Senate plan on the basis that it did not comply with Section 2 of the Voting Rights Act.

[8] This motion was granted by document 460. In its order dated May 13, 1992, the Florida Supreme Court indicated its willingness to entertain Section 2 challenges to the then-validated plan, but plaintiffs have elected to assert their Section 2 claims in this federal forum.

[9] The court GRANTED the motions contained in documents 71, 204, 381, and 424 and DENIED the motions contained in documents, 366, 368, 372, 386, 443, 445, 446, 450, 452, 453, 455, 459, 477, 481, 499 and 503.

[10] By order dated June 27, 1992 and pursuant to Title 28, United States Code, Section 2284, the Chief Judge of the Eleventh Circuit Court of Appeals convened a three-judge panel consisting of the same three judges.

478). The court then turned to the Florida Senate redistricting plan.

The DOJ indicated its belief that the Florida Supreme Court's modification to the Hillsborough County area Senate districts satisfied its previous objection. The Department stated that a preclearance decision would be made within days of the State's submission of the plan to the Department. The same day, this court imposed the Florida Supreme Court plan as its own plan for section 5 purposes. *See* Tr. I-37. The effect of this was to eliminate the need for preclearance. "Plans imposed by court order are not subject to the [preclearance] requirements of § 5." *Wise v. Lipscomb*, 437 U.S. 541 (1978); *see also State of Texas v. United States of America*, 785 F.Supp. 201, 205 (D.D.C. 1992). At the same time, however, the court indicated its intention to entertain Section 2 challenges on both the Florida Senate and Florida House plans.[11]

In Count VIII of the *De Grandy* plaintiffs' fourth amended complaint,[12] plaintiffs allege that both the Florida House and Senate redistricting plans encompassed in joint resolution of legislative reapportionment, SJR 2-G, violate Section 2 of the Voting Rights Act, Title 41, United States Code, Section 1973, *et. seq.* *See* document 506 at 51-60. Specifically, plaintiffs contend that "[t]he joint resolution of apportionment . . . unlawfully frag-

[11] It was our intent to immediately conduct a section 2 review of the Senate plan and we adopted the plan despite its potential section 2 problems. Because the plan adopted by the Florida Supreme Court could not be a valid plan subject to a section 2 challenge until after it was precleared by the Department of Justice, we adopted the Supreme Court plan as our own plan in order to give the parties a formal plan to challenge.

[12] In a ruling from the bench on June 27, 1992, the court permitted plaintiffs to once again amend their complaint. Both the Justice Department and the NAACP plaintiffs allege section 2 violations; *the De Grandy* fourth amended complaint, however, is more precise.

ments cohesive minority communities and otherwise impermissibly submerges their right to vote and to participate in the electoral process. Document 506 at 52 ¶ 137. Plaintiffs attack both the Dade County districts in the Senate plan and the Dade and Escambia County districts in the House plan as violative of Section 2,[13] alleging that

> The African-American population in Escambia County was split into two districts, one of 30% black population and one of 14% black population. SJR 2-G deliberately fractures Escambia County's African-American population in order to protect white, incumbent representative, Speaker-designate Bo Johnson. Alternative plans encapsulate the black population in a relatively compact, cohesive, 40% black community of interest.
>
> * * * *
>
> In Dade County, black citizens were fragmented in District 118 and District 119. Many African-American seats were also packed with many Hispanic citizens which dilutes the ability of African-Americans to elect candidates of choice.
>
> * * * *

[13] In their fourth amended complaint, plaintiffs also attacked several other House districts. With court approval, plaintiffs later dismissed their Section 2 challenges to districts 8 (Leon, Gadsden, Calhoun, Jackson, and Liberty Counties), 22 (Alachua, Marion, Levy, Putnam, St. Johns Counties), 28 (Volusia, Seminole, Brevard, Counties), 45 (Polk and Hillsborough Counties), 55 (Pinellas County), and 82 (Charlotte, DeSoto, Highlands, Indian River, Lee, Okeechobee, St. Lucie Counties). Although plaintiffs' motion indicates that this dismissal would be without prejudice, the court did not state whether the dismissal would preclude plaintiffs filing a subsequent lawsuit challenging the dismissed districts.

Because plaintiffs concede that a majority African-American district cannot be drawn in Escambia County, their challenge is not really based on Section 2 of the Voting Rights Act; rather, plaintiffs' allegations that the district lines were drawn with a discriminatory purpose is based on the Fifteenth Amendment to the United States Constitution.

Hispanic voters are packed in Districts 110 (82.1%), 111 (75.7%), and 114 (77.5%) and further submerges Hispanic voters in black minority districts, specifically, District 103 (62% black, 27.8% Hispanic), District 109 (63.0% black, 34.5% Hispanic), and District 118 (34.5% black, 27.1% Hispanic). Less egregious examples of packing, but still having the same dilutionary effect, are District 104 (57.8% black, 16.1% Hispanic), Anglo District 105 (19.2% Hispanic), Anglo District 106 (32.3% Hispanic), District 108 (66.2% black, 16.0% Hispanic). SJR 2-G appears to purposefully pack, fracture and submerge Hispanic population deliberately to dilute Hispanic voting strength;

Nine Hispanic-American majority districts were created in SJR 2-G; however, other plans submitted to the Legislature show that eleven majority-Hispanic-American seats can be created in the Dade County area. This dilution of Hispanic voting strength is accomplished by the aforementioned packing, fracturing, and submergence with the intent and purpose of protecting white incumbents;

* * * *

With respect to the plan for apportionment for the Florida State Senate, . . . the redistricting plan enacted by the State of Florida creates 7 Senate districts in the Dade County area. The state's plan fragments the Hispanic population concentrations such that Hispanics comprise a majority of the voting age population only in three districts. The racial and ethnic population concentrations existing in the Dade County area are such that, if the Dade County area of the state is divided into equally populated legislative districts which respect communities of interest and follow other non-discriminatory plan-drawing criteria, Hispanics would constitute a significant voting age majority of the population in one additional Senate district in Dade County.

Document 506 at ¶¶ 141(a), (i); 142(a), (b). The complaint also alleges that the creation of these districts was both intentional and willful, and for the purpose of preserving white incumbent legislators and discriminating against African-American and Hispanic candidates and electorate. Document 506 at ¶ 145.

The entire trial lasted five days—from Friday, June 26, 1992 through Wednesday, July 1, 1992, excluding Sunday, June 28, 1992. The court first heard testimony concerning the Senate Plan. At the close of plaintiffs' case in chief, defendants orally moved for a directed verdict, which was denied by the court. Tr. III-216. The Senate defendants then presented their case. The court next turned to the attack upon the Dade County portion of the House plan.

The parties advised the court that they were attempting to settle the Escambia portion of the lawsuit by redrawing the Escambia County House districts. After hearing the testimony of one of plaintiffs' Escambia County witnesses, the court ruled from the bench that the "plaintiffs [had] established a prima facie case on the constitutional violation in the Escambia County area of Florida." Tr. IV-18. Before the close of plaintiffs' prima facie case, the court was notified that the parties, except for plaintiff-intervenor Darryl Reaves, had reached a settlement agreement as to the Escambia County House districts. Upon the granting of the House defendants' oral motion to dismiss Reaves for lack of standing as to Escambia County,[14] Tr. VIII-59, the court considered and approved the proposed consent judgment (document 548). *See* Tr. VIII-94.

On July 1, 1992, at the close of all testimony and oral argument, the court ruled from the bench that

> the plaintiffs have shown a fourth Hispanic district can be drawn in accordance with the *Gingles* stand-

[14] Reaves is a resident of Dade County.

> ard, but the plaintiffs [15] have failed to prove that a fourth Hispanic district can be drawn without creating a regressive effect upon Afro-American voters in Dade County and South Florida. . . . Consequently, under Supreme Court precedent, this court must give deference to the state policy as expressed in the Florida plan as validated by the Florida Supreme Court.

Tr. VIII-53. The court denied plaintiffs' oral motion for reconsideration. Tr. VIII-61.

After hearing closing argument as to the Dade County portion of the Florida House plan, the court ruled from the bench that "under the totality of the circumstances, the plaintiffs have shown a violation of Section 2 in that the plaintiffs have shown that more than nine Hispanic districts may be drawn without having or creating a regressive effect upon black voters in South Florida and in Dade County." Tr. VIII-83. The court indicated its intention to immediately proceed into the remedy phase of this case. The court later imposed the Modified De Grandy Plan as its own plan. Tr. VIII at 160. On July 2, 1992, the court entered judgment as to the 1922 Florida Senate Plan (document 553) and as to the 1992 Florida House Plan (document 554), the latter supplemented on July 6, 1992 (document 559). Following the trial, the House and Executive defendants moved for reconsideration (documents 550 and 556). These motions were denied (documents 555 and 560). The House defendants also moved for reconsideration, rehearing and for a stay (document 561) the court denied (document 571).

This opinion memorializes and explains the court's rationale for its July 2, 1992 rulings.

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[15] The court specifically noted that its ruling applied to *all* plaintiffs and not just the De Grandy plaintiffs. Tr. VIII at 60.

II. FINDINGS OF FACTS AND CONCLUSIONS OF LAW [16]

A. Section 2 of the Voting Rights Act

As amended and in pertinent part, Section 2 of the Voting Rights Act of 1965 provides as follows:

> (a) No voting qualification or prequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one "circumstance" which may be considered, provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

As originally passed, Congress intended for the language of Section 2 to parallel the language of the Fifteenth Amendment. *City of Mobile v. Bolden*, 446 U.S.

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[16] Any finding of fact which may be a conclusion of law shall be considered a conclusion of law. Conversely, a conclusion of law which may be a finding of fact shall be so considered.

55, 60-61 (1980) (plurality opinion). Because Section 2 paralleled the Fifteenth Amendment, the plurality of the Supreme Court held that a plaintiff was required to prove discriminatory intent to establish a violation of Section 2. *Bolden*, 447 U.S. at 62, 71. In response to the Supreme Court's ruling in *Bolden*, Congress amended section 2 in 1982 to include a "results" or "effects" test to determine whether racial vote dilution has occurred. *See* Senate Report at 27; *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986); *see also Burton v. Sheheen*, No. 3:91-2983-1, 1992 U.S. Dist. LEXIS 7461, slip op. at 32-36 (D.S.C. 1992).

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court received its first opportunity to review the 1982 Section 2 amendments. *Gingles* involved a Section 2 challenge to the use of multi-member districts in North Carolina. The Court held that "[t]he essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. Additionally, the law is clear that Section 2 extends coverage to "language minorities" including Hispanics. *Chisom v. Roemer*, 111 S.Ct. 2354, 2362 & n.18 (1991); *Hastert v. State Bd. of Elections*, 777 F.Supp. 634, 648 (N.D.Ill. 1991).

In determining whether a Section 2 violation has occurred, "a court must assess the impact of the contested structure or practice on minority electoral opportunities 'on the basis of objective factors.'" *Gingles*, 478 U.S. at 44 (quoting Senate Report at 27). The Supreme Court in *Gingles* reiterated the list of "typical" factors which may be relevant to, and probative of, a Section 2 claim as set forth in the Senate Report. These "Senate factors" include:

> 1. The extent of any history of official discrimination in the state or political subdivision that

> touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the election of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

> Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group. And whether the policy underlying the state or political subdivision's use of

> such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

See Senate Report at 206-07 (citing *White v. Regester*, 412 U.S. 755 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973)).

This list is not exhaustive—it is not required that any number of the factors be proved and other factors may be relevant. *Gingles*, 478 U.S. at 45. The Court did note, however, that "the most important Senate Report factors bearing on Section 2 challenges to multi-member districts are the 'extent to which minority group members have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized.'" *Gingles*, 478 U.S. at 49 n.15 (quoting U.S.C.C.A.N. 1982 at 206).

The Court, however, set forth the following important limitations on the extent to which these factors establish liability under Section 2:

> [W]hile many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice.

Gingles, 478 U.S. at 48.

The Court then listed three circumstances which "are necessary preconditions for multi-member districts to operate to impair minority voters' ability to elect representatives of their choice." *Gingles*, 478 U.S. at 49-50. These preconditions are:

> 1) the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district;

> 2) the minority group must be able to show that it is politically cohesive
>
> 3) the minority group must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.

The purpose of the first requirement is to determine whether "minority voters [would] possess the *potential* to elect representatives in the absence of the challenged structure or practice." *Gingles*, 478 U.S. at 50 n.17. As the *Gingles* court noted, because a minority population which is spread evenly throughout the district "cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure," they cannot maintain that the multimember electoral system itself dilutes the voting strength of the minority voters. *Gingles*, 478 U.S. at 50 n.17.

Thus far, the Supreme Court has not spoken as to whether the *Gingles* analysis applies when a court is faced with a challenge to single member districts. District courts are divided on this issue with the courts in *Armour v. Ohio*, 775 F.Supp. 1044 (N.D. Ohio 1991), *Illinois Legislative Redistricting Commission v. LaPaille*, 782 F.Supp. 1272 (N.D. Ill. 1992), and *Emison v. Growe*, 782 F.Supp. 427 (D. Minn. 1992), *jur. noted*, 112 S.Ct. 1557, *motion gr.* 1992 U.S. LEXIS 3673 (1992) holding that the *Gingles* preconditions do not apply to a single-member district plan, and the courts in *Hastert*, 777 F. Supp. 634, and *DeBaca v. County of San Diego*, No. 91-1282-R(M), 1992 WL 114049 (S.D. Cal. May 11, 1992) holding that they do.[17] We find the approach taken by

[17] Other courts have held that these preconditions also apply to cases involving challenges to single-member districts. *See, e.g., Hastert v. State Bd. of Elections*, 777 F.Supp. 634, 639 (N.D.Ill.

Hastert and *DeBaca* to be persuasive and accordingly turn to examining the *Gingles* factors.

Of course, the effect of proving these three preconditions is an open question in this circuit. In *Solomon v. Liberty County, Florida*, 899 F.2d 1012 (11th Cir. 1990) (en banc), *cert. denied*, 111 S.Ct. 670 (1991) this circuit divided 5-5 as to the legal effect of proving the three *Gingles* factors. Because we find a Section 2 violation under either Judge Kravitch's or Judge Tjoflat's approach, the court need not address the conflict raised in *Solomon*. In other words, this court concludes that the plaintiffs have satisfied each of the three elements *Gingles* requires and that when considered together with the Senate factors, the "totality of the circumstances" show that with respect to Florida's Senate Plan, Hispanic and African-American vote dilution exists in Dade County in violation of § 2 of the Voting Rights Act. Additionally, under the totality of the circumstances, Hispanic vote dilution exists in Dade County under Florida's House Plan.

B. Application of the Gingles Factors

1. *Sufficiently Large and Geographically Compact*

a. Sufficiently Large (Citizenship)

The *Gingles* court stated that in order to State a claim under Section 2, the minority group must show that it is sufficiently large to constitute a majority in a single member district. There is some dispute as to whether the term "majority" as used in *Gingles* refers to a numerical majority or a voting majority, and therefore, whether a court should focus on voting age population or total population as the measure of opportunity within a given

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1991) (three-judge court); *Gunn v. Chickasaw County*, 705 F.Supp. 315, 318 (N.D.Miss. 1989); *McDaniels v. Mehfoud*, 702 F.Supp. 588, 591-92 (E.D.Va. 1988).

district. *See Burton v. Sheheen*, slip op. at 45-6 (*citing McDaniel v. Mehfoud*, 708 F.Supp. 754, 756 (E.D.Va. 1989). Although the *Burton* court noted that the Ninth Circuit has held in *Garza v. County of Los Angeles*, 918 F.2d 763, 774-76 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 681 (1991) that total population may be an adequate measure of minority opportunity,[18] it followed the holdings of both *McDaniel* and *McNeil v. Springfield Park District*, 851 F.2d 937, 944-45 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989) and concluded that "political opportunity is best measured in terms of minority voting age population." *Burton*, slip op. at 46-7.

This court has previously indicated its view that the VAP is the relevant inquiry as concerns redistricting,[19] and we adopt the rationale and conclusion of the *Burton* court that voting age population (VAP) rather than total population provides a better measure of opportunity within a given district to elect a candidate of choice. Creating districts containing a bare majority VAP of minority groups such as African-Americans and Hispanics, however, will not necessarily remedy a Voting Rights Act violation because, even if minorities constitute fifty percent of the overall population or voting age population in a district, they may not make up fifty percent of the voters. *See Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). The court found in *Ketchum* that "minorities must have something more than a mere majority even of voting age population in order to have a reasonable opportunity to elect a representative of their choice." *Ketchum*, 740 F.2d at 1413. According to the experts, there are four key reasons why a supermajority of minority VAP is necessary to create effective minority districts:

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[18] *But see Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989) (eligible minority *voters*, rather than total minority population, is the appropriate measure of geographical compactness).

[19] Document 411 at 8; Tr. V-40.

> (a) there are typically more *aliens* among minority (especially Hispanic) populations; (b) the *voting age population* is typically a lower proportion of the total population among minorities; (c) *registration* rates are often lower among minorities; and (d) *turnout* rates are often lower among minorities.

Kimball Brace, et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 Law & Policy 43, 47 (1988) emphasis in the original).

An Hispanic supermajority of the VAP is necessary to account for the fact that many Hispanics are noncitizens and have lower voter registration rates. Document 438 (Congressional Opinion) at 16. This fact is not disputed by any party and is confirmed by the testimony of Dr. Moreno: "[t]he nature of tripartite politics in Dade means that only when Hispanics have a super majority can a Latin candidate win." Affidavit of Dr. Dario Moreno (document 471 at 27). Because the issues in this case were whether a fourth majority Hispanic Senate district and whether a tenth and eleventh majority Hispanic House district could be drawn in Dade County, much of the testimony revolved around what constituted a "supermajority" of Hispanic VAP sufficient to enable Hispanics to elect a candidate of their choice.

Much of the testimony addressed the "65 percent rule" and the impact of citizenship on the voting age population. The 65 percent rule states that "barring exceptional circumstances, a district should contain a black [or Hispanic] population of at least 65 percent (or a voting age population of at least 60 percent) to provide blacks [or Hispanics] with an opportunity to elect a candidate of their choice." Brace, *supra* at 44. The origin of this rule has been traced to the United States Supreme Court case of *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144, 97 S.Ct. 996 (1977) and has been subsequently addressed in *Ketchum* and *Neal v. Coleburn*, 689 F.Supp. 1426 (E.D.Va. 1988). According to Kimball Brace, the foundation of the rule is suspect:

> Legend has it that the rule came about because someone in the Justice Department took 50 percent and simply added 5 percent to compensate for the higher proportion of Hispanic noncitizens, 5 percent for lower Hispanic voting age population (VAP) and 5 percent for lower Hispanic registration and turnout.

Brace, *supra*, at 44.

In his testimony before the court in *Ketchum*, 740 F.2d at 1415, Mr. Brace stated the rule in a slightly different way:

> [The 65 percent rule] is derived from the 50 percent total population, adding five percent for each of the three factors that are voting age population, because minorities tend to have a lower voting age population, lower registration patterns and a lower turnout pattern.

In accord, Jeffers v. Clinton, 756 F.Supp. 1195, 1199 (E.D.Ark. 1990) (three-judge court), *aff'd*, 111 S. Ct. 662 (1991) (citing *Smith v. Clinton*, 687 F.Supp. 1361, 1362-63 (E.D.Ark. 1988) (three-judge court), *aff'd* 488 U.S. 988 (1988)). Whereas in *Clinton* and *Ketchum*, Mr. Brace would supplement the 50 percent majority figure by five percent *each* for low voter registration and low voter turnout (for a total of ten percent), in his law review article, he would supplement the 50 percent majority figure by five percent *total* for low registration and turnout.

For this and other reasons, the 65 percent rule is not universally accepted by experts and has been modified or rejected by some courts.[20] *See e.g.*, Tr. VI-6 (Dr. Weber). The court in *Rybicki v. State Board of Elections*, 574 F.Supp. 1147, 1149 (N.D.Ill. 1983) stated that:

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[20] While some experts, such as Dr. Arrington, would still attempt to create Hispanic districts containing Hispanic VAPs of 65%, Affidavit of Dr. Arrington (Exhibit to document 474 at 6), other experts, such as Dr. Weber, would not.

> The 65% figure is a general guideline which has been used by the DOJ reapportionment experts and the courts as a measure of the minority population in a district needed for minority voters to have a meaningful opportunity to elect a candidate of their choice. The 65% guideline, which the Supreme Court characterized as "reasonable" in [*Carey*], takes into account the younger median population age and the lower voter registration and turnout of minority citizens.

The court in *Coleburn* noted that

> [T]he general 65% guideline for remedial districts is not a required minimum which the plaintiffs must meet before they can be awarded any relief under § 2 of the Voting Rights Act. Rather, the 65% standard is a *flexible and practical guideline to consider* in fashioning relief for a § 2 violation.

Coleburn, 689 F.Supp. at 1438. The *Coleburn* court noted that the 65% figure is an "approximation of the type of corrective super-majority that may be needed in any particular case" which may have to be "reconsidered and adjusted in light of 'new information' and changing circumstances." *Coleburn*, 689 F.Supp. at 1438 (citing *Ketchum*, 740 F.2d at 1416 nn. 20, 21).

In his affidavit, Dr. Arrington indicates why he and other experts have modified the 65% rule insofar as it affects African-Americans:

> [B]ecause minority communities are now better organized and minority citizens more likely to register and vote than was true in an earlier era [,i]t is not always necessary to have 60% [African-American VAP district] to assure blacks the opportunity to elect candidates of their choice. Although a 60% black VAP is probably still a good goal, 55% black VAP is almost always enough for black citizens to have an opportunity to participate in the political process and elect candidates of their choice.

Affidavit II of Dr. Arrington (exhibit to document 474). The court in *Ketchum* similarly concluded that a 65% supermajority of African-American VAP might no longer be necessary to ensure African-Americans a chance to elect a candidate of their choice and advised district courts to reconsider that figure in light of new information and statistical data:

> For example, we note that the Rev. Jesse Jackson's 1984 presidential candidacy has apparently stimulated black registration and turnout nationally. More specific to Chicago, we understand that the November 1982 gubernatorial election in Illinois and the 1983 Chicago mayoral election indicated a marked increase in black registration and turnout. If these and other elections should demonstrate a significant and consistent change in voting behavior in Chicago applicable to aldermanic elections, there would have to be a corresponding change in redistricting practices and legal standards[.]

Ketchum, 740 F.2d at 1416 n.21.

The testimony in this case also showed that African-Americans turn out in much higher rates than Hispanics. Tr. VI-282-83 (Lisa Handley).

The effectiveness of the African-American majority districts created by the Florida House and Senate plans is not in dispute. The African-American VAP in these districts ranged from 50.96% to 57.24% in the House districts and from 51.7% to 52.5% in the Senate and no party has attempted to argue that these districts would not result in an African-American candidate of choice being elected.[21] Thus we find that a district with an

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[21] There was testimony that because districts containing a simple majority of African-American VAP would elect an African-American candidate of choice, districts containing 57 or 58 percent African-American VAP are designed to waste African-American votes and are, therefore, "packed." Tr. VI-135-36.

African-American majority VAP is an effective district which gives African-Americans a potential for electing candidates of their choice. Accordingly, the NAACP's proposed three African-American districts satisfy the "sufficiently large" requirement. The only question, therefore, is whether the VAP in the proposed one additional Hispanic Senate district and two additional Hispanic House districts would enable Hispanic voters in these districts to elect candidates of choice without impairing the VAPs in the surrounding 3 Hispanic Senate and 9 Hispanic House districts.

Plaintiffs' own witness testified that an Hispanic Senate district containing 55% Hispanic VAP [22] would be "problematic" inasmuch as the VAP would be too low to guarantee that the district would result in the election of the Hispanic candidate of choice. Tr. II-66. Plaintiffs submitted evidence, however, that a district containing 59 percent Hispanic AP *would* enable Hispanics to elect a candidate of choice.[23] Specifically, Dr. Lichtman testified that

> Once the Hispanic concentration reaches a certain point, then all those districts seem to elect Hispanics, but below that given point, none of the districts seem to elect Hispanics. . . . [N]o candidate of choice of the Hispanic . . . has been elected in districts below a 59 percent Hispanic level, and in districts at 59 percent and above, those districts have in every instance elected Hispanic candidates

Tr. III-24. Dr. Lichtman concluded that the Hispanic VAP of 62.1 percent in district 40 provided Hispanics a

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[22] District number 35 in the De Grandy Senate plan.

[23] Javier Souto had repeatedly been reelected in a district containing 59% Hispanic VAP. Tr. II-153.

"realistic opportunity" to elect a candidate of choice in that district.[24] TR III-30, 67-8. Dr. Lichtman's assessment included adjusting for the lower Hispanic voter turnout. Declaration of Dr. Allan J. Lichtman at 2. Although Dr. Lichtman had previously recommended to the Dade County commission that they attempt to create "rock solid" majority Hispanic districts containing 65% Hispanic VAP and "rock solid" majority African-American districts containing 55% African-American VAP, these districts were created "for an entirely different purpose" and he "erred on the side of making sure that [these] seats would be safe." Tr. III-94, III-233. He then reaffirmed his conclusion that "a 62 percent district, while not an absolute lock . . . certainly comes well within the range to provide Hispanic voters a realistic potential to elect candidates of their choice." Tr. III-94.

Defendants, on the other hand, submitted evidence that after accounting for the lower level of citizenship for Hispanics, some of the newly created Hispanic districts would not be effective. In other words, although the Hispanic VAP might indicate that these districts would tend to elect a Hispanic candidate of choice, because the number of Hispanic *citizens* (as opposed to voting age residents) did not constitute a majority, Hispanics would not be able to elect a candidate of choice without relying on a certain percentage of white-crossover votes. According to defendants, the creation of these two additional Hispanic districts would do nothing more than dilute the Hispanic citizen VAP in the remaining nine districts and would result in a decrease in safe Hispanic districts.

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[24] The fourth proposed Hispanic district in the De Grandy plan contained 55% Hispanic VAP. The De Grandy plaintiffs seemed to agree that the Reaves/Brown plan (where the fourth proposed Hispanic district contained 62.1% Hispanic VAP) would be more effective.

In support of their argument, defendants cite De Grove's testimony that after adjusting for citizenship, a district containing 66% Hispanic VAP would have less than 50% Hispanic voters.[25] Tr. VII-26, 29. Defendants further note that citizenship levels vary among Hispanic districts—older, settled Hispanic neighborhoods in the central part of the city will have higher citizenship levels than the neighborhoods which attract more recent arrivals.[26] Tr. VII-49. Whereas according to Dr. Weber, Cubans have a higher citizenship rate than other groups, Tr. V-26, Dr. Moreno testified that due to the high number of recent Hispanic arrivals tending to settle in the South Beach area, there was a "higher level of [Hispanic] non-citizenship and a higher level of [Hispanic] non-registration" in South Beach than in other areas of the city. Tr. II-72-73. Because of this, plaintiffs' proposed 35th Senate district would not be an effective district. Tr. II-72. Plaintiffs responded by noting that their proposed 35th district does not consist entirely of South Beach; rather, the lack of Hispanic citizens in South Beach is balanced by the highly concentrated Hispanic areas of Little Havana.

Defendants also argued that plaintiffs were changing their position. According to defendants, in the congressional redistricting hearings, plaintiffs had contended that a 65% supermajority was necessary for Hispanics to elect a candidate of choice, but now they contend that a 59% or 62% supermajority would allow them to do so. Plain-

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[25] De Grove testified that 32% of the population (Anglo, African-American and Hispanic combined) in Dade County are not citizens. Tr. VII-20-1. Furthermore, he testified that in a hypothetical tract containing a 100% Hispanic population, 55% of the tract's population would be non-citizens. Tr. VII-23.

[26] Although it would be possible to estimate the citizenship levels on a tract by tract basis, the smaller sample size (district versus county) would present statistical problems. Tr. VII-52.

tiffs explained that the reason why plaintiffs advocated such a high VAP for the Hispanic congressional districts was because only two districts were being formed.[27] Because everyone agreed that only two Hispanic districts would be drawn, "it ma[de] sense to hedge your bet and make those districts as Hispanic as possible." Tr. II-115. *See also* Tr. II-67-8. Furthermore, according to Dr. Arrington, a higher minority VAP is necessary for congressional districts to perform than for state legislative districts to perform:

> One would certainly want a somewhat higher black VAP for Congressional districts than for the state legislature because of the greater organization and financing necessary to conduct a campaign at that level.

Arrington Aff. at 6. Although his analysis specifically applies only to African-Americans, there is no reason to suspect it would not also apply to Hispanics.

The court finds that because minority groups have a younger population than majority groups, a supermajority of Hispanic and African-American total population is necessary in order to create an opportunity for those groups to elect candidates of their choice. Because Hispanics communities are characterized by a large number of non citizens and a lower voter registration and turnout rates, a supermajority of Hispanic VAP is necessary to create districts in which Hispanics can elect candidates of choice. Like Hispanics, African-Americans must also constitute a supermajority of the total population of the district in order to elect a candidate of choice; however, because of the recent increases in African-American turnout and registration, a supermajority of

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[27] In our order dated May 29, 1992, however, this court found that a supermajority was necessary. The congressional inquiry was different from the inquiry in this Section 2 case because in the former, we were merely "considering" Section 2 when formulating districts, while here we are presented with a specific challenge to the Florida plan.

African-American VAP is not necessary in order to elect an African-American candidate of choice. Furthermore, although the court finds that both a supermajority of Hispanic and African-American total population and a supermajority of Hispanic VAP are necessary, we decline to express these requirements as exact percentages.

The court further finds that both the Senate districts proposed by plaintiff-intervenors Reaves/Brown/Hargrett and the House districts proposed by the De Grandy plaintiffs would create districts containing effective Hispanic voting majorities. Each of the proposed Senate districts in the Reaves/Brown plan and House districts in the De Grandy plan contains an Hispanic VAP of a least 60%. Because the 65 percent rule already accounts for citizenship, making another adjustment for citizenship would overstate its importance and lead to double counting.[28] Finally, the fact that the plaintiffs themselves are satisfied with these percentages also tends to indicate the effectiveness of the proposed districts. *Coleburn*, 689 F. Supp. at 1438.

b. Geographical Compactness

Plaintiffs have shown that the Dade County's Hispanic population is sufficiently large and geographically compact to constitute a majority in four Senate and eleven

[28] Specifically, the 65 percent rule is premised on the fact that many Hispanics are non-citizens and have lower voter registration and turnouts. If this were not the case, there would be no reason to create districts containing more than 50.1% Hispanic VAP. No one disagrees that because of the lower citizenship and registration/turnout rates, Hispanic districts must contain a supermajority of Hispanic VAP. As previously stated, the 65 percent rule was "arbitrarily" created to account for these problems. Thus, this court must either (1) accept or modify the 65 percent rule or (2) formulate its own methodology for estimating the number of non-citizens reflected in the Hispanic VAP for the various districts. Because each of the districts contains a 60% Hispanic VAP and, therefore, "satisfies" the 65 percent rule, the court need not further inquire as to the Hispanic citizenship levels in each proposed district.

House districts. Hispanics constitute nearly one million persons in the Dade County area, and the county has sufficient concentrations of Hispanic population that can be easily combined to create four Senate and eleven House districts that contain effective Hispanic voting majorities. Hispanics have primarily settled in three sections of Dade: the Little Havana section of the City of Miami, the "West Dade area" comprising the communities of Sweetwater, Village Green, Westchester and West Kendall, and the Northwest section of the county consisting of the cities of Hialeah, Miami Springs, and their surrounding neighborhoods. Moreno Aff at 5-6. There is also a sizeable Hispanic (mostly Mexican) farm-worker community in the Homestead area. Document 471 at 5-6. The Cuban migration patterns went from east to west—as Cubans improved economically, they moved out of the Little Havana area into the suburbs. Tr. III-12. With the exception of the Miami airport, which separates Little Havana from Hialeah and Miami Springs, the Hispanic population forms a compact and contiguous line from Hialeas to Kendall. Tr. III-13. The two most dramatic areas of Hispanic growth in Dade County are along Miami Beach[29] and the Kendall/West Kendall area. Tr. II-14.

The African-American population is also sufficiently large and geographically compact to constitute a majority in two Senate and four House districts in Dade County.[30] The concentrations of the African-American population essentially rest in the north central portion of urbanized Dade County including Opa-Locka, Liberty City and Carol City. Tr. VI-205; II-15-16. There are also pockets of non-Hispanic African-Americans in downtown Miami (including Overtown), Coconut Grove, and Richmond

[29] In 1980, Miami Beach was 30 percent Hispanic. In 1990, it is 49 percent Hispanic. Tr. II-14.

[30] The African-American population can also support another majority district in Broward/Palm Beach counties.

Heights. Tr. II-16; VI-205. Finally, there are African-American neighborhoods in Florida City, Homestead, Couldo, and South Miami. Tr. II-16. The Allapattah area is the border zone between African-American neighborhoods (to the east) and Hispanic areas (to the west). Tr. II-15.

The court in *Hastert v. State Bd. of Elections*, 777 F.Supp. 634 (N.D.Ill. 1991), noted that the *Gingles* geographical compactness requirement is not "an aesthetic concept." *Hastert*, 777 F.Supp. at 649. In that case, most of Chicago/Cook County's Hispanic population was "clustered into two dense enclaves, one on Chicago's near northwest side and the other on the near southwest side," but that the two enclaves were "less than a mile from each other at their closest points." *Hastert*, 777 F.Supp. at 649. Concluding that Chicago's Hispanic community was geographically compact within the meaning of *Gingles* despite the fact that the clusters were separated, the court held that "[t]he separation of clusters is not indicative of the existence of two distinct communities, but appears to have occurred as a result of exogenous physical and institutional barriers." *Hastert*, 777 F.Supp. at 649. Despite the fact the Hispanic community existed in two separate enclaves, the court in *Hastert* concluded that the Chicago/Cook County Hispanic community was sufficiently large and geographically compact to constitute a single district majority. *Hastert*, 777 F.Supp. at 649.

Other courts have echoed the fact that compactness is not an aesthetic concept. In *Dillard v. Baldwin County Board of Education*, 686 F.Supp. 1459, 1465-66 (M.D. Ala. 1988), the court held that "[a]n aesthetic norm, by itself, would be not only unrelated to the legal and social issues presented under Section 2, it would be an unworkable concept, resulting in arbitrary and capricious results, because it offers no guidance as to when it is met." The court in *Wilson v. Eu*, 1 Cal. 4th 707, 823 P.2d 545, 1992 Cal LEXIS 6 (1992), held that the compactness requirement should be used to promote the creation of functional voting districts that allow for effective representation. Specifically, the court held that

> Compactness does not refer to geometric shapes but to the ability of citizens to relate to each other and their representatives and to the ability of representative to relate effectively to their constituency.

Eu, 1992 Cal LEXIS at 20.

In this case, plaintiffs testified that the primary difference between their House plan and the Florida House plan was that the De Grandy House plan attempted to draw the Hispanic districts from north to south while the state drew the districts from east to west. Tr. IV-22. The De Grandy/Reaves/Humphrey plaintiffs and the DOJ argue that Florida's House plan fragments and dilutes the Hispanic vote. Dr. Moreno testified that House District 116 of the Florida plan has an Hispanic VAP of 48 percent. Tr. III-263. Additionally, Dr. Moreno pointed out that the line of District 116 separates heavily Hispanic neighborhoods in District 112 from the rest of the heavily Hispanic Kendall Lakes area and the Kendall area. Tr. III-263-264. Dr. Moreno concluded that the Florida plan erects a barrier between "neighbors making up the same, basically what is the same housing development in Kendall Lakes." Tr. III-264. Additionally, Dr. Moreno testified that in order to protect a white incumbent the Florida plan packs District 114 with an Hispanic VAP of over 78 percent. Tr. III-265. Dr. Moreno also pointed out that in District 102 and District 109 the State repeated the process of fragmenting Hispanic communities. Tr. III-265. This court does not find that the districts drawn by the De Grandy plaintiffs are significantly less geographically compact than those drawn by the state of Florida.[31] Nor are these districts "so un-

[31] As the court in *Jeffers v. Clinton*, 730 F.Supp. 196, 207 (E.D. Ark. 1989), stated:

reasonably irregular, 'bizarre,' or 'uncouth' as to approach obvious gerrymandering." *Coleburn*, 689 F.Supp. at 1437. Furthermore, these districts are "relatively compact and are in line with the configuration of electoral districts that have been approved in other cases." *Coleburn*, 689 F.Supp. at 1437 (*citing Rybicki v. State Board of Elections*, 574 F.Supp. 1082, 1146, 1166-67 (N.D.Ill. 1982) (three judge court)). Finally, the court finds that the districts as drawn in the De Grandy House and Senate plans would create functional voting districts that allow for effective representation.

2. *Political Cohesiveness*

The testimony showed that the Hispanics and African-Americans were each politically cohesive among themselves but were not at all cohesive—and were often at odds—in relation to each other. *See e.g.* Tr. III-35-36; *Meek v. Metropolitan Dade County*, 908 F.2d 1540, 1545-46 (11th Cir. 1990). There is a high degree of tension in Dade County between the African-American population and the Hispanic population. Tr. II-82. Furthermore, while African Americans tend to vote Democratic, Hispanic voters tend to vote Republican. Tr. II-28. The focus of this *Gingles* prong, however, is *not* the joint cohesiveness of two separate minority groups, but rather whether "Hispanics" as a group and/or "African-Americans" as a group are politically cohesive.

a. *Hispanic*

The total Hispanic population of Dade County is 953,407 of which 55 percent is Cuban American. Moreno

[S]ome of the districts [proposed by the plaintiffs] look rather strange, but we do not believe this is fatal to plaintiffs' position. Their alternative districts are not materially stranger in shape than at least some of the districts contained in the present apportionment plan. The one-person, one-vote rule inevitably requires that county lines and natural barriers be crossed in some instances, and that cities and other political and geographic units be split in others.

Aff. at 5. It is estimated that during the 1980's, over 300,000 Latin Americans moved into Dade County. Moreno Aff. at 5. Of these, the Mariel boatlift in 1980 brought in 125,000 Cuban refugees, while Nicaraguans fleeing the Sandinista regime and civil war in 1986 and 1987 numbered approximately 79,000.[32] Tr. II-17. Thousands of Colombians, Peruvians, Hondurans, Guatamalans and Puerto Ricans also melded into Dade's flourishing Hispanic community during the 1980s. According to the 1990 census, non-Cuban Hispanics account for 40.7% of the Hispanic voters in Dade County. Tr. II-86.

The testimony showed that there is a high degree of political cohesiveness among Cuban voters in Dade County although the testimony was less clear about the cohesiveness of non-Cuban Hispanics. Because Dr. Moreno focused on Hispanics as a group and not on the individual Hispanic subgroups, he was not able to form any conclusions as to voting preferences of these individual subgroups.[33] Tr. II-84-91.

In general, "the Hispanics in Dade County are distinguished from Hispanics in the other part of the country by being more conservative and much more Republican." Moreno Aff. at 16. The strong loyalty Cuban-Americans have to the Republican party is seen by their voting patterns in several elections. In 1986, Republican Bob Martinez carried the Hispanic precincts of Dade over his Democratic opponent, receiving 79 percent of the vote. Moreno Aff. at 17. In 1988, President George Bush carried the Hispanic precincts of Dade County with over 85 percent of the vote, while Senator Connie Mack carried the same districts with about 80 percent of the vote. Moreno Aff. at 16. Between 1980 and 1990, Democratic

[32] According to Dr. Moreno, this number is believed to be undercounted by 30,000.

[33] It was unclear whether this data is not available or if the appropriate analysis was not done. Tr. II-112.

party registration among Hispanics in Dade County decreased from 49 to 24 percent, while Republican registration increased from 39 to 68 percent. Moreno Aff. at 18. The Cuban vote stands in stark contrast to that of other Latinos across the United States who have consistently supported the Democratic ticket by two-to-one margins. Moreno Aff. at 18. The cohesiveness of Dade's Hispanic community has also been buttressed by the idealogical affinity of its two largest groups—Nicaraguans and Cubans. Moreno Aff. at 9. These two groups continually work together for a conservative foreign policy agenda. Moreno Aff. at 9; Tr. II-18. Acoerding to Representative Miguel De Grandy,[34]

> There is a union between Cuban-Americans, Nicaraguans and other Central Americans in basic philosophy, first to form policy because . . . they are basically political and not economic migrations, unlike other Hispanic sectors of the United States; they generally have a very conservative, very anti-communist political philosophy on the foreign affairs.

Tr. II-145.

Dade County has a significant amount of Hispanic African-Americans including immigrants from the Dominican Republic and Puerto Rico.[35] Tr. II at 33. Although Dr. Moreno testified that Dominicans identified more with the Hispanic culture than that of the African Americans, the cohesiveness of the 70,000 Dade County Puerto Ricans is less clear. Moreno Aff. at 33. According to Dr. Moreno, Dade County Puerto Ricans seem to identify with the language minority stronger than with the racial minority. Tr. II-33, 84-85. Furthermore, Dade

[34] Mr. De Grandy is not testifying as an expert.

[35] This is significant, for example, in the 36 district where the non-Hispanic African American VAP is 49%, but the total African-American VAP is 52%. Thus, there is approximately three percent Hispanic African-American VAP in this district.

County Puerto Ricans tend to be more Republican and more conservative than their Puerto Rican counterparts in New York.[36] Tr. II-17. Nonetheless, the statistical evidence shows that Puerto Ricans tend to register more as Democrats (50%) than Republicans (40%). Tr. II-142, 179. According to Dr. Moreno, the fact that Puerto Ricans and Cubans do not share the same party affiliation does not mean that the two groups are not cohesive; rather, Hispanic Democrats tend to vote for Hispanic Republicans when they have that opportunity. Tr. II-103.

According to Representative De Grandy, the various Hispanic groups tend to have very similar views in the areas of education, housing, medically needy programs" among others. Tr. II-145-6. Furthermore, the various Hispanic groups tend to have the same political philosophy in areas such as civil rights and discrimination. These groups have united to actively oppose the English only initiative. According to Dr. Moreno, "[t]he fear of language based discrimination [both in the form of English only initiatives and otherwise] has served to unite Dade's Hispanic communities." Moreno Aff. at 7.

We conclude that there is a sufficient degree of political cohesiveness among Hispanics to satisfy the second *Gingles* prong, although there might be differences between the several Hispanic subgroups.

b. African Americans

All of the evidence indicated that Dade County's African-American community is cohesive. Dr. Weber testified that African-Americans are "generally" cohesive and tend to vote for Democratic candidates in general elections. Tr. VI-142. Dr. Lichtman similarly testified that "blacks are politically cohesive, . . . unite in large

[36] In fact, "[a]ll the Hispanic ethnic groups by nationality tend to be more conservative than their counterparts in other large U.S. metropolitan areas." Tr. II-18.

numbers behind candidates of their choice and . . . prefer to elect black candidates when there are elections with black candidates competing against candidates of other races." Tr. III-35. Both this court and Florida Supreme Court Chief Justice Leander Shaw have previously held that the approximately 590,000 African-American residents in the Broward/Dade/Monroe county area [37] are politically cohesive [38]:

> Black voters in Florida generally vote as a cohesive racial block for the black candidate when there is a black versus white choice on the ballot for a given office.

Document 411 (Report of Special Master) at 23. *See also In re SJR 2G*, No. 79,674 at 34-37 (Shaw, C.J., dissenting); document 388 (Report of Independent Expert to Special Master) at ¶ 10. Furthermore, the testimony received in the legislative hearings underscore this conclusion. Accordingly, we conclude that both African-Americans and Hispanics are politically cohesive groups within the meaning of the second *Gingles* prong.

3. *White Block Voting*

Dr. Allan J. Lichtman,[39] defines "racially polarized voting" as "the extent to which members of distinct racial or ethnic groups support different candidates of their choice." Affidavit of Dr. Lichtman, Government Exhibit 46 at ¶ 4; Tr. III-13. Racially polarized voting can be

[37] Affidavit of Thomas B. Hoeffler, document 472 at 8.

[38] African-American registration in Dade County is 90 percent Democrat. Moreno Aff. at 19. "The antipathy of Black voters to Republican candidates is illustrated in recent presidential and statewide races [where] no GOP candidate received more than 12 percent of the Black vote." *Id.* African-Americans also vote heavily for Democrats in state legislative elections. *Id.*

[39] Dr. Lichtman is a professor of history and formerly Associate Dean of the College of Arts and Sciences at The American University in Washington, D.C.

subdivided into two parts: minority cohesion, which is the extent to which minority voters support candidates of their choice, and white bloc voting, which is the extent to which whites support different candidates. Government Exhibit 46 at ¶ 4. According to Dr. Lichtman, "[r]acially polarized voting is politically significant if, under a given electoral system, it impedes the opportunities for minority voters to elect candidates of their choice." Government Exhibit 46 at ¶ 4.

There was a substantial amount of testimony—both during the Congressional redistricting hearings and the state legislative hearings—that voting in Dade County is racially polarized. The court notes Chief Justice Leander Shaw's conclusion in *In re Constitutionality of Senate Joint Resolution 2G Special Apportionment Session 1992*, No. 79-674, slip op. at 34-37 (Fla. May 13, 1992) (Shaw, C.J., dissenting) that "[t]he results of Florida's legislative elections over the past ten years established the presence of racially polarized voting." Likewise, Dr. Arrington stated that "most elections involving both Afro-Americans and Hispanics are racially polarized." Arrington Aff. at 1. Furthermore, according to Dr. Lichtman

> The results reported in Table 1 [exhibit to government exhibit 46] show a clear pattern of racially polarized voting, Hispanic cohesion, and white bloc voting. It also shows that black voters united with white voters in opposition to Hispanic candidates for Senate and House positions [40] . . . . The results re-

[40] "In every election studied, Hispanics voted for Hispanic candidates in greater proportion than either whites or blacks. The results reported in Table 1 show a pattern of strong political cohesion. By generally overwhelming majorities, Hispanic voters preferred to elect Hispanic candidates to state legislative positions. In 11 of 13 elections for the Senate of House, ecological regression results show that more than 75 percent of Hispanic voters opted for the Hispanic candidates." Government Exhibit 46 at ¶ 6.

> ported in Table 1 likewise show a pattern of strong bloc voting by whites for non-Hispanic candidates [. . . and] indicate that blacks joined with whites in opposing Hispanic Senate and House candidates. . . . These findings of Hispanic cohesion and white bloc voting are supported by the analyses of additional local elections in Dade County.

Lichtman Aff. at ¶¶ 6-9; *See also* Tr. III-18-19.

Furthermore,

> The high degree of racially polarized voting documented for legislative elections in Dade County indicates that Hispanic voters would have an opportunity to elect candidates of their choice only in Districts with Hispanic voting-age majorities. Otherwise white bloc voting would usually be sufficient to defeat the candidate of choice of Hispanic voters.

Lichtman Affidavit at ¶ 10. Finally, the reports prepared by consultants for the state also recognize that because of the strong polarization between Hispanics and non-Hispanics in Dade County, opportunities for Hispanics to elect candidates of their choice are impeded. Lichtman Aff. at ¶ 11.

According to Dr. Moreno, Dade County is profoundly divided by the competing interests of three distinct and separate ethnic groups—African American, Hispanic, and Non-Hispanic White—each of whom has different social and economic interests. Moreno Aff. at 3. According to Dr. Moreno, "[t]he division of Dade along ethnic lines has made Miami the contemporary symbol of racial upheaval in America." Moreno Aff. at 3. There is a "high degree of tension in Dade County between the Afro-American population and the Hispanic population." Tr. II-82. Furthermore, the division of the three major ethnic groups has led to the development of tripartite politics in Miami; that is, ethnic factors between the three communities predominate over all other factors in Dade politics.

According to Dr. Moreno, "[m]inorities are usually only able to elect their candidates when they are firmly in the majority." Moreno Aff at 20. Furthermore, "white candidates are aided by the deep cleavages between Republican Hispanics and Democratic Blacks." Moreno Aff. at 3. According to Dr. Moreno, there are four types of racially polarized elections in Miami:

> First, [there] are races featuring a Hispanic candidate versus a White candidate with Black[s] supporting the White candidate; second, a Black candidate versus a White candidate with Hispanic voters supporting the White candidate; third, a Black candidate versus a Hispanic candidate with White voters holding the balance of power and finally the[re] are races between two candidates of the same ethnic group in which voters from the other two group[s] support the least ethnic of the two candidates.

Moreno Aff. at 21.

Dr. Moreno cites specific examples of recent races in which ethnic factors predominated over all others including the congressional race between Gerald Richman and Ileana Ros-Lehtinen where "[t]he campaign strategies of both campaigns were based purely on ethnic calculations." Moreno Aff. at 23. Cuban-Americans, offended by the perceived racism of Richman, voted for Ros-Lehtinen by a margin of 88 to 12 percent. Although Richman carried all of the other blocs of voters—Jewish, Anglo, and Black—because these voters represented only 47 percent of the electorate, Richman lost the race. According to Dr. Moreno, "Ros-Lehtinen won simply because more Cubans voted and almost all of them voted for Ros-Lehtinen." Moreno Aff. at 24.

In 1990, two Hispanic incumbents almost lost their seats in the state legislature to non-Hispanic White chal-

lengers. Moreno Aff. at 26-27. Javier Souto was barely re-elected to the State Senate from the 40th district when Tom Easterly won 74 percent of the non-Hispanic White vote and 92 percent of the Black vote. [41] Moreno Aff. at 26-27. Souto was able to defeat his Anglo opponent by winning over 80 percent of the Hispanic vote. State Representative Al Gutman also nearly lost his 105 district seat to a non-Hispanic White candidate. His challenger, Steve Leifman, won 42 percent of the vote in this heavily Hispanic district by carrying two-thirds of the non-Hispanic White vote and 83 percent of the African-American vote. Gutman survived by winning 92 percent of the Hispanic vote. In another race, Hispanic challenger Orlando Cruz was earily defeated by incumbent Art Simon in an ethnically polarized election in the 116th District despite the fact that Cruz carried 77 percent of the Latin vote. Moreno Aff. at 26-27; Tr. II-109. According to Dr. Moreno, "this pattern of ethnic polarized voting against Hispanics was not restricted to the 1990 elections." Moreno Aff. at 27. Rather, "[t]he pattern of bloc voting by non-Latin White and Blacks against Hispanics is found in elections at all levels against both Latin challengers and incumbents." Moreno Aff. at 27.

African-Americans have also been the victims of block voting. According to Dr. Moreno, "Black candidates faced with a White-Hispanic coalition and lacking adequate finances have largely been limited to running in the three state House districts (106, 107, 108) and in the one state Senate district (36) where Blacks comprised an overwhelming majority." Moreno Aff. at 28. In 1986, Bob Starks, a White Republican, barely beat Nathaniel Edmond, an African-American Democrat in the general election for state House district 118. Despite the fact that Democrats out-registered Republicans in this district 21,202 to 9,968, Stark won by carrying nearly all of the

[41] In his live testimony, Dr. Moreno stated that even fewer African-Americans crossed over (3.7%). Tr. II-95.

White votes in the district. This occurred despite the fact that Edmond had the support of almost all of the African-American voters.[42] In 1990, Darryl Jones, an African-American Democrat won the election despite losing the White vote. Jones beat John Minchew 64 to 36 percent because more African-Americans turned out at the polls and he carried enough of the White vote (24 percent) to put him over the top. Moreno Aff. at 29. According to Dr. Moreno, block voting is not limited to legislative races, for "Black[] candidates have also fared poorly in seeking county-wide office." Moreno Aff. at 29.

4. *Additional Findings*

The history of discrimination against African-Americans in Florida was addressed in depth in our order of May 29, 1992 and will not be restated here. *See* document 438 at 2-3. The court also finds sufficient evidence of language based discrimination against Dade County Hispanics. According to Dr. Moreno, "[t]he fear of an anti-Spanish backlash has been reinforced by English only initiatives, at both the county and state level, which seem to be specifically aimed at Miami's Latin population." Moreno Aff. at 7. In his affidavit, Dr. Moreno also cites specific examples of language based discrimination: including the suspension of a supermarket clerk for speaking Spanish in front of customers and the refusal of a personnel agency to refer people with foreign accents to job openings at a Miami bank. Moreno Aff. at 8-9.

The record clearly established that Florida's minorities have borne the social, economic and political effects of this discrimination. This is true despite the fact that Cubans have fared relatively well in South Florida. Although

[42] Although blacks comprise only 29 percent of the population of this district, they exert greater influence because most of the Hispanics in this district are not United States citizens. Thus, African-Americans represent over one third of the registered voters in this district.

Miami has a Cuban mayor and South Florida is the home of three Cuban state senators, Tr. II-101, language based discrimination still exists in South Florida. While the witnesses disagreed as to whether Hispanics of African-Americans bore more of the brunt of discrimination, everyone agreed that both groups had suffered.[43] In fact, as a result of this discrimination, the United States DOJ must preclear five Florida counties pursuant to Section 5 of the Voting Rights Act, as amended. § 1973 *et seq.* Those counties are Collier, Hardee, Hendry, Hillsborough and Monroe.[44]

In this case, the DOJ and the De Grandy/Reaves/Humphrey plaintiffs have established that Florida's Senate reapportionment plan dilutes the voting strength of Hispanics in Dade County and the surrounding areas. Additionally, plaintiff NAACP has established that Florida's Senate reapportionment plan dilutes the voting

[43] Representative Burke felt that African-Americans have suffered greater discrimination than Hispanics. Tr. VII-126. Dr. Weber similarly testified that "African-Americans have had greater difficulty than Hispanic Americans" in achieving political empowerment in South Florida. Tr. VI-145. Likewise, Dr. Moreno testified that

> Blacks are also the most disadvantaged of the three major ethnic groups that live in the Greater Miami area. In all social-economic indicators[,] Afro-Americans are the worst off of Dade [C]ounty's citizens.
>
> . . . Miami's Black community facing discrimination, poverty, and not participating in local decision-making has erupted in violence four times during the 1980's.

Moreno Aff. at 11-12. Plaintiff Darryl Reaves testified that there was discrimination against both Cubans and African-Americans and could not state which group has been most victimized. Tr. V-132.

[44] These five counties are subject to the Section 5 preclearance requirement because they provided election information only in the English language when more than five percent of the voting age citizens were Spanish-speaking, and fewer than fifty percent of them were registered to vote or voted in the 1972 Presidential Election. *See* 41 Fed.Reg. 34329 (August 13, 1976); 40 Fed. Reg.—— (September 23, 1975).

strength of African-Americans in Dade County and the surrounding areas. With respect to Florida's House reapportionment plan, all of the parties have agreed that Florida's plan fragments the African-American community in Escambia County.[45] The DOJ and the De Grandy/Reaves/Humphrey plaintiffs have also established that Florida's House reapportionment plan dilutes the voting strength of Hispanics in Dade County. We must now fashion a remedy.

III. REMEDY

A. The Senate

Florida's new Senate plan (Plan 330) creates five minority-majority districts of which two have African-American voting age population (VAP) majorities and three have Hispanic VAP majorities. The three Hispanic VAP majority districts and one of the African-American VAP majority districts are contained wholly within Dade County. The other African-American VAP majority district is contained in the South Florida counties of Broward and Palm Beach. In the three Hispanic VAP majority districts, Hispanics constitute the following percentages of the VAP: (1) District 34—66.3 percent; (2) District 37—64.3 percent; and (3) District 39—76.1 percent. African-Americans constitute 52.5 percent of the VAP of District [illegible] in Dade County, and 51.7 percent of the VAP in the Broward/Palm Beach district, District 30. The Senate reapportionment plan creates seven Dade County districts of which five districts are wholly within

[45] All plaintiffs and the defendants agreed that voting is racially polarized in Escambia County, and that the African-American population in Escambia County is large, compact, and concentrated in the Pensacola area. Additionally, the parties agreed that Florida's House plan split the politically cohesive community in Escambia County into several districts. Thus, the parties agreed to a consent judgment which formulated new House districts in the Escambia County area uniting the African-American population of the Pensacola area. (Doc. 548).

Dade County and two additional districts are comprised of portions of Dade County and the surrounding areas.

The DOJ and the De Grandy/Reaves/Humphrey plaintiffs take exception to Florida's Senate reapportionment plan as it pertains to Dade County because the state's proposed plan fragments the Hispanic population concentrations such that Hispanics comprise a majority of the VAP only in three districts. Specifically, the DOJ and the De Grandy/Reaves/Humphrey plaintiffs point out that as a result of Florida's Senate reapportionment plan 28.55 percent of the Hispanic population of Dade County will reside in state Senate districts that Hispanics will have no possibility of winning. *See* Moreno Aff. at 32-38. The DOJ and the De Grandy/Reaves/Humphrey plaintiffs contend that if the racial and ethnic population concentrations existing in the Dade County area are divided into equally populated Senate districts which respect communities of interest and follow other non-discriminatory plan drawing criteria, Hispanics would constitute a significant voting age majority of the population in an additional Senate district. In our order dealing with congressional redistricting, we held that "the voting age population (VAP) is the relevant number to be used in determining whether minorities in a particular district will be able to elect a candidate of their choice." *De Grandy v. Wetherell*, Nos. TCA 92-40015-WS, 92-40131-WS, slip op. at 16 (N.D. Fla. May 29, 1992) (citing *Solomon*, 899 F.2d at 1018. The court in *Ketchum* explained that VAP is the best measure of minority voting strength because age is a legal prerequisite to voting and minority groups generally have a younger population which comprise a large proportion of the individuals who are ineligible to vote. *Ketchum*, 740 F.2d at 1412-1413. Because minority groups generally have a younger population than majority groups, the use of VAP as the relevant number for creating minority-majority districts requires that minority groups constitute a supermajority of the total population

of an electoral district. *See Ketchum*, 740 F.2d at 1412-1413.

Additionally, our congressional order held that "because Hispanic communities are characterized by a large number of non-citizens and lower voter registration rates, a supermajority of the VAP is necessary to create districts in which Hispanics can elect candidates of their choice." *De Grandy*, Nos. TCA 92-40015-WS, 92-40131-WS, slip op. at 16. In determining whether a fourth district can be created in which Hispanics constitute a supermajority of the VAP, we must consider "emerging changes in sociological and electoral characteristics if minority groups and broad changes in political attitudes." *Ketchum*, 740 F.2d at 1416. These changes may alter, or eliminate the need for a supermajority corrective figure. *Ketchum*, 740 F.2d at 1416.

In this case, the DOJ and the De Grandy/Reaves/Humphrey plaintiffs have established that Hispanics can elect candidates of their choice in Dade County and its surrounding areas when the Hispanics constitute at least 59 percent of an electoral district's VAP. Dr. Lichtman testified that in Dade County and its surrounding areas "[n]o Hispanic candidates have been elected in districts below a 59 percent Hispanic level, and in districts at 59 percent and above, those districts have in every instance elected Hispanic candidates." Tr. III-24. Based on the record as a whole, we find that the electoral characteristics of Hispanics in Dade County indicate that 60 percent is an appropriate guideline for determining if a fourth Hispanic VAP supermajority district can be created in the Dade County area. We note, however, that in areas with high concentrations of recent Hispanic arrivals, such as the South Beach area of Miami, an effective VAP supermajority district must have a VAP higher than our 60 percent guideline level. Tr. II-55.

The De Grandy/Reaves/Humphrey plaintiffs have established that four geographically compact districts can

be drawn in which Hispanics in Dade County would have the potential to elect candidates of their choice. Plaintiff Reaves submitted Plan 180 which creates four Hispanic VAP supermajority districts. In Plan 180's four majority Hispanic districts, Hispanics constitute the following percentages of the VAP: (1) District 33—66.8 percent; (2) District 34—65.0 percent; (3) District 35—65.7 percent; and (4) District 40—62.1 percent.[46] Although this plan remedies the dilution of the Hispanic vote, we must examine the extent to which the plan addresses the African-Americans' vote dilution claim.

Plan 180, like Florida's Senate plan, creates two African-American VAP majority districts. Nevertheless, these two districts do not fully address the vote dilution claim of African-Americans. The NAACP takes exception to Florida's Senate reaapportionment plan as it pertains to Dade County and the surrounding areas because the state's proposed plan fragments the African-American population concentrations such that African-Americans comprise a majority of the VAP in only two South Florida districts. Specifically, the NAACP contends that if the racial and ethnic population concentrations existing in the Dade County area are divided into equally populated Senate districts which respect communities of interest and follow other non-discriminatory plan drawing

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[46] Plaintiff De Grandy, on the other hand, submitted plan 275 which also contains four Hispanic voting age population majority districts. In plan 275's majority Hispanic districts, Hispanics constitute the following percentages of the voting age population: (1) District 33—71.5%; (2) District 34—66.1%; (3) District 35—55.0%; and (4) District 40—66.2 (Plan 275). District 35 in this plan falls short of our 60 percent guideline and De Grandy's own expert, Dr. Moreno, admitted that district 35 was "problematic" because its 55 percent VAP was probably too low for Hispanics to be able to elect candidates of their choice. Tr. II-66. Additionally, this district includes the South Beach area of Miami which contains a large number of recent arrivals who are non-citizens. Tr. IV-158. This additional fact makes this 55 percent district unacceptable and we reject plan 275 as a viable option.

criteria, African-Americans would constitute a voting age majority of the population in an additional Senate district.

Like Hispanics, African-Americans must also constitute a supermajority of the total population of a district in order to be able to elect candidates of their choice due to a young population. *See Ketchum*, 740 F.2d at 1412-1413. African-Americans, however, may not need a supermajority of the VAP of a district because the minority group has experienced changes in its electoral characteristics. We take judicial notice of the fact that Jesse Jackson's 1984 and 1988 presidential campaigns stimulated African-American registration and turn-out nationally. *See Ketchum*, 740 F.2d at 1416 n.21. Thus, we find that because of changing African-American electoral characteristics, a simple majority of the VAP is an appropriate guideline for determining if a third African-American majority VAP district can be created in the Dade County area.

The NAACP has established that three geographically compact districts can be drawn in which African-Americans in Dade County would constitute a majority of the VAP and have the potential to elect candidates of their choice. The NAACP submitted a plan which creates three African-American VAP majority districts. Two of the African-American VAP majority districts consist of Dade County area residents with one district spilling over into areas of Broward County. The other South Florida African-American VAP majority district is in the Broward/Palm Beach area and is comparable to the Broward/Palm Beach district in Florida's Senate reapportionment plan. In the NAACP plan's three African-American VAP majority districts, African-Americans constitute the following percentages of the VAP: (1) District 39 in Dade—51.7 percent; (2) District 37 in Dade and Broward—53.6 percent; and (3) District 35 in Broward and Palm Beach—51.6 percent. This plan's creation of three African-American VAP majority dis-

tricts remedies the dilution of the African-American vote in the South Florida, however, it fails to address the vote dilution claim of Hispanics in Dade County because the plan only creates three Hispanic VAP supermajority districts.

This court is faced with two independent, viable Section 2 claims in South Florida and our remedy must address both of those claims. An ideal solution would be to order the drawing of four supermajority VAP Hispanic districts and three majority VAP African-American districts in South Florida. The evidence in this case, however, established that the ideal remedy for the Section 2 violations in this case is not a viable option. During the course of the examination of John Gutherie, Staff Director of the Senate Committee on Reapportionment, the court inquired about the possibility of creating a plan containing four Hispanic and three African-American districts.

> JUDGE HATCHETT: Yes, he has the answer. I have a question, though. From all of your experience working in South Florida, is it possible to draw four VAP majority Hispanic districts and three majority black districts?
>
> . . . .
>
> THE WITNESS: It's amazing, Your Honor, what you can do with these computers. . . .
>
> If you ask me would I believe that you could do it, I would believe that. But it gets to the notion of—because of numerosity—of how thin you're willing to cut your margins on both the African-American and the Hispanic seats, cutting them down to a bare VAP majority in order to accomplish that.
>
> JUDGE HATCHETT: You've answered my question.

Tr. IV-194-195. In trying to create a plan with four Hispanic supermajority VAP districts and three African-American majority VAP districts, the NAACP was confronted with Gutherie's "numerosity" concern and his concern over how much of a margin is necessary to insure that minorities have opportunities to elect candidates of choice.

Counsel for the NAACP, Charles Burr, informed the court that "it is technically feasible to draw a four and three, but we were completely unable to get the percentages of the districts up to a level that I believe the parties will find acceptable." Tr. IV-217. Thus, the NAACP concluded that in order to create four Hispanic supermajority VAP districts and three African-American majority VAP districts, the number of minorities found in each district can be no more than our bare VAP majority guidelines. Additionally, the NAACP realized that these districts would contain an insufficient level or margin to ensure that minorities would have the opportunity to elect candidates of their choice.

After realizing that the NAACP had also established a Section 2 violation with respect to African-Americans, in that a third African-American VAP majority district could be created, plaintiff Reaves argued to the court that Plan 180 is in fact a "four-three plan." To establish that Plan 180 does in fact create three African-American VAP majority districts in addition to its four Hispanic VAP supermajority districts, plaintiff Reaves compared his African-American districts to those found in the NAACP's plan. Plaintiff Reaves contends that the NAACP's District 37, which is comprised of Broward and Dade Counties, is comparable to Plan 180's District 32 which also covers Broward and Dade County. Additionally, Reaves points out that the NAACP's District 39 which is wholly within Dade County, is comparable to Plan 180's District 36 which is also wholly within Dade County. Finally, Reaves argues that District 35 in the NAACP plan, a Broward/Palm Beach Senate seat, is comparable to Plan 180's District 28 which goes through Broward and St. Lucie County. Thus, plaintiff Reaves asserts that

Plan 180 creates, in essence, three African-American VAP majority districts without diluting the Hispanic vote.

Contrary to the assertions of plaintiff Reaves, we find that Plan 180 does not create three African-American majority VAP districts, and in fact, dilutes the African-American vote. Plan 180's third "African-American seat," District 28, does not contain an African-American majority VAP. African-Americans in District 28 of Plan 180 only constitutes 47.1 percent of the VAP. Gutherie describes this less than majority seat as follows:

> What is sometimes referred to as an access or influence seat begins in the Pompano Beach area north of Ft. Lauderdale, proceeds up to West Palm Beach and then across the Everglades into—the Everglades agricultural area—into Ft. Myers and northward through St. Lucie County, Ft. Pierce into Vero Beach and Indian River County.

Tr. IV-153-54. Gutherie also points out that the configurgation of District 28 is the result of Plan 180's inclusion of African-Americans in Ft. Lauderdale and the adjoining communities into District 32, the Plan's second African-American majority district which is comprised of portions of Dade and Broward Counties. Tr. IV-157. Specifically, Gutherie notes that:

> Because this large concentration population in downtown Ft. Lauderdale is not available for a further access seat or majority society north of Dade County, what Plan 180 has to do in order to accomplish that end is string a district as we discussed earlier, District 28, going from Pompano Beach north to Vero Beach and Indian River County, and west of Ft. Myers on the Gulf Coast.

Tr. IV-157-58. Thus, based on the record as a whole we find that Plan 180 does not create three African-American VAP majority districts.

Not only does Plan 180 fail to create a thrid African-American majority VAP district, Plan 180 is retrogressive to African-Americans in Dade County and the surrounding areas. With respect to the two African-American majority VAP districts and Plan 180, Dr. Weber testified that after analyzing the turnout for those particular districts, that it was his opinion that

> based upon analysis of turnout, the same kind of analysis I did for the Hispanic districts, that those districts are designed—and I'm sorry to use these words, and they may be offensive to some people in the courtroom, but they are designed to waste African-American votes. . . . They are packed, and there are more African-Americans than are necessary to provide a realistic opportunity for African-Americans to elect candidates of choice.

Tr. VI-135. Additionally, with respect to District 28, Dr. Weber testified that his turnout test for that district indicated that it would "fail miserably in terms of [its] ability to put African-Americans in control on the general election day." Tr. VI-136. Thus, Dr. Weber concluded that Plan 180's packing of African-Americans into Districts 32 and 36 in order to facilitate the creation of four Hispanic supermajority VAP districts, had a "decimating effect" on the possibility of creating an additional African-American majority seat in South Florida. Tr. VI-136. Based on the record, we find that plan 180 creates only two African-American majority VAP districts and its third African-American access district has tested to be ineffective. Thus, Plan 180 is in essence a four/two plan which continues to dilute the African-American vote.

After considering all of the evidence, this court came to the conclusion that the remedy for the Hispanics' Section 2 claim in South Florida and the remedy for the African-Americans' Section 2 claim in South Florida were mutually exclusive. Tr. VIII-53. The state of Florida, faced with the competing interests of Hispanics and Afri-

can-Americans in Dade County, sought to strike the fairest balance in its Senate reapportionment plan with respect to all the Dade County ethnic communities. The Supreme Court has held that:

> Reapportionment is primarily a matter for legislative consideration and determination . . . state legislatures have 'primary jurisdiction' over legislative reapportionment. . . . A federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the state, as expressed in statutory and constitutional provisions, or in the reapportionment plans proposed by the state legislative, whenever adherence to state policy does not detract from the requirements of the federal Constitution.

Upham v. Seamon, 456 U.S. 37, 41, (1982) (quoting *White v. Weiser*, 412 U.S. 783, 795 (1973)). Because state legislatures have primary jurisdiction over legislative reapportionment, we must examine the state of Florida's policy choices and preferences as we determine the proper remedy for balancing the competing minority interests in South Florida. Realizing that the creation of a fourth Hispanic VAP supermajority district would adversely affect African-Americans in South Florida and that the creation of a third VAP majority district would adversely affect Hispanics in Dade County, the Florida Senate plan reaches a compromise in that it creates three supermajority Hispanic VAP districts and two majority African-American districts with a strong African-American influence district in the Dade County area.

The influence district in the Florida plan, as Gutherie describes,

> commences in the Liberty City/Overtown area, proceeds south through the Black Grove, Black Coral Gables, and south in Dade County through Leisure City, Richmond Heights, down and through Homestead and finally ending in Florida City. That district also includes Monroe County. The overall African-American VAP of that district is 35.5 percent. The district includes, by the way, most of current House District 118. House District 118 is a district which has 26 percent African-American VAP, 30 percent Hispanic VAP.
>
> In 1990, Tom Easterly, a white incumbent, left a seat in order to run for the Florida Senate. There was a primary, a democratic primary, which was contested by two African-Americans. Those were the only two people on the ballot. And the winner of that primary, Daryl Jones, won the general election by a margin of 65 percent over the Republican opponent.

Tr. IV-155. This influence district, District 40, in the Florida Senate reapportionment plan, creates in essence a district in which African-Americans can elect a candidate of their choice because of strong minority coalitions between the African-Americans and the Mexican-Americans, as well as white cross-over votes. Representative Willie Logan, Chairman of the Florida Caucus of Black State Legislators, testified that:

> The Joint Resolution as adopted by the Supreme Court better represents the black community not only in Dade County, but in south Florida. And the reasons for that are very simple: first of all, the seat that's in south Dade, which is only a thirty-some-odd-percent voting age population seat, also includes non-Cuban Republican Hispanics, that which are the Mexican community, which have proven over a period of time that they support not only Democratic candidates, but they are willing to support black candidates. And that was an example in the Daryl Jones House seat that also was testified at the south Dade hearing by the American-Mexican community, that they prefer to be in the district that would be

represented by a black versus being a district that would was being Republican.

Tr. III-147. Additionally, Representative Logan testified that the Florida Senate reapportionment plan comported closely with the desires of African-Americans with respect to having an African-American district based in the Ft. Lauderdale area of Broward County, and two African-American districts based in Dade County. Tr. III-156. Thus, this court finds that the Florida Senate Reapportionment Plan's Dade County African-American influence district performs as a third African-American district without adversely affecting Hispanics in the Dade County area. The court in *DeBaca*, noted in discussing balancing the interest between two minority groups that

> Federal courts have recognized that these political questions do exist and that the best means to resolve them is in the process of give-and-take between citizens and their elected officials. Political questions necessarily require that policy choices be made before they can be resolved. This is not a task federal courts are equipped to handle. They have recognized their shortcomings in this area, and will, whenever possible, defer to legislative policy choices, even if the choice is perceived to be unwise or is simply not the optimum choice.

DeBaca, 1992 WL 114049 at *2 (citing Strange, *Application of Voting Rights Act to Communities Containing Two or More Minority Groups—When is the Whole Greater than the Sum of the Parts?*, 20 Tex. Tech. L.Rev. 95, 124-125 (1989)). We find that between all the plans presented to the court, the Florida Senate Reapportionment plan is the fairest to all the ethnic communities in Dade County and the surrounding areas, and is the proper remedy in this case. Consequently, this court gives deference to the state policy as expressed in the Florida plan as validated by the Florida Supreme Court and imposes that plan as the remedy in this case. *See Upham v. Seamon*, 456 U.S. 37 (1982).

B. The House

Florida's House plan creates thirteen minority-majority districts of which nine have Hispanic VAP supermajority districts and four have African-American VAP majority districts. Eight of the nine Hispanic districts are contained in Dade County and the ninth Hispanic district is in Collier County. The four districts containing an African-American majority VAP are contained in Dade County. In the nine Hispanic supermajority VAP districts, Hispanics constitute the following percentages of the VAP: (1) District 102—65.68 percent; (2) District 107—63.85 percent; (3) District 110 is 83.64 percent; (4) District 111 76.56 percent; (5) District 112—68.67 percent; (6) District 113—75.70 percent; (7) District 114—78.38 percent; (8) District 115—65.28 percent; and (9) District 117—69.18 percent. African-Americans constitute the following percentages of the VAP in the four African-American districts: (1) District 103—55.73 percent; (2) District 104—50.96 percent; (3) District 108—57.24 percent; and (4) District 109—55.21 percent. Florida's House reapportionment plan creates twenty Dade County districts of which seventeen are wholly within Dade County and two share populations with other counties. District 102 joins population in Dade County with Collier County, and District 120 joins population in southern Dade County with Monroe County.

The De Grandy/Reaves/Humphrey plaintiffs and the DOJ take exception to Florida's House reapportionment plan as it pertains to Dade County because Florida's House plan fragments the Hispanic population concentrations such that Hispanics constitute a majority in only nine House districts. The plaintiffs contend that if the Dade County area of the State is divided into equally populated House districts which respect communities of interests and follow other nondiscriminatory plan-drawing criteria, Hispanics would constitute a supermajority of the VAP in two additional House districts.

For reasons already discussed in connection with the Senate, we hold that VAP is the relevant number for creating minority-majority House districts and that a supermajority of the VAP is necessary to create districts in which Hispanics can elect candidates of their choice. *See supra* section III, A. Additionally, we note that a supermajority VAP of 60 percent is an appropriate guideline for determining if two additional Hispanic districts can be created in the Dade County area. *See supra* Section III, A. In this case, the DOJ and the De Grandy/Reaves/Humphrey plaintiffs have established that eleven geographically compact districts can be drawn in which Hispanics in Dade County would have the potential to elect candidates of their choice.

The De Grandy/Reaves/Humphrey plaintiffs submitted the De Grandy plan which creates eleven Hispanic supermajority VAP districts. Hispanics constitute the following percentages of the VAP in the De Grandy plan's eleven Hispanic districts: (1) District 105—71 percent; (2) District 108—78.2 percent; (3) District 109—64.6 percent; (4) District 110—66.2 percent; (5) District 111—65.8 percent; (6) District 112—64.5 percent; (7) District 113—66.6 percent; (8) District 114—65.8 percent; (9) District 115—68.2 percent; (10) District 116—65.8; and (11) District 117 65.6 percent. This plan remedies the dilution of the Hispanic vote and does not adversely affect African-Americans because it creates four African-American districts. In the four African-American districts, African-Americans constitute the following percentages of the VAP: (1) District 102—57.6 percent; (2) District 103—57.8 percent; (3) District 106—57.7 percent and (4) District 107—57.3 percent.

Pursuant to *Upham v. Seamon* and *White v. Weiser*, this court sought to limit its intrusion upon state policy to what was necessary to correct the Section 2 violation. Accordingly, we allowed the State of Florida to present another House plan which remedied the dilution of the Hispanic vote and preserved its policy choices. The Florida House defendants initially presented a remedy containing only ten Hispanic districts which this court rejected as not fully remedying the dilution of the Hispanic vote. After warning the court to be very careful and deliberate in considering any changes to the Florida House plan, the Florida House defendants presented another remedial plan. Tr. VIII-126.

The Florida House defendants' second remedial plan contained eleven Hispanic supermajority VAP districts and four African-American VAP districts. In the House defendants' second remedial plan, the changes were confined to Dade County. Tr. VIII-126. The eleven Hispanic districts in the Florida House defendants' second remedial plan contain the following Hispanic VAP percentages: (1) District 102—65.78 percent; (2) District 106—61.34 percent; (3) District 107—61.05 percent; (4) District 110—77.66 percent; (5) District 111—77.39 percent; (6) District 112—62.77 percent; (7) District 113—62.22 percent; (8) District 114—65.23 percent; (9) District 115—65.29 percent; (10) District 116—65.60; and (11) District 117 at 63.81 percent. With respect to African-Americans, the second remedial plan created four African-American districts containing the following African-American VAP percentages: (1) District 103—61.51 percent; (2) District 104—55.10 percent; (3) District 108—55.25 percent; and (4) District 109—64.60 percent.

Because the Florida House defendants arbitrarily confined its changes to Dade County, the House defendants' second remedial plan does not create eleven effective House districts which give Hispanics the potential to elect the candidates of their choice. The second remedial House plan creates two House districts in the Miami Beach area which as we noted earlier has high concentrations of recent arrivals and non-citizens. Tr. VIII-129-130. Additionally, these two districts, District 106 and District 107, have Hispanic VAP of 61 percent. Tr. VIII-130. We

noted in our discussion of Florida's Senate plan that areas with high concentrations of recent Hispanic arrivals must have a VAP significantly higher than our 60 percent guideline level. *See supra* Section III, A. Because these two 61 percent districts are located in areas with high concentrations of recent Hispanic arrivals, we find that these districts do not give Hispanics a reasonable opportunity to elect candidates of their choice. Hence, we reject the Florida House defendants' second remedial plan because it fails to remedy the dilution of the Hispanic vote in South Florida.

The De Grandy/Reaves/Humphrey plaintiffs presented the modified De Grandy plan which sought to respect the policy choices of the state of Florida by merging the De Grandy remedy for South Florida into the existing Florida plan. The eleven Hispanic South Florida districts in the modified De Grandy plan contain the following Hispanic VAP percentages: (1) District 105—71.62 percent; (2) District 108—81.89 percent; (3) District 109—63.74 percent; (4) District 110—62.50 percent; (5) District 111—66.19 percent; (6) District 112—65.10 percent; (7) District 113—66.06 percent; (8) District 114—66.39 percent; (9) District 115—68.52 percent; (10) District 116—65.83 percent; and (11) District 117—66.24 percent. With respect to African-Americans in South Florida, the modified De Grandy plan creates four African-American districts containing the following African-American VAP percentages: (1) District 102—55.12 percent; (2) District 103—59.54 percent; (3) District 106—57.93 percent; and (4) District 107—56.46 percent. The modified De Grandy plan also creates a strong African-American access district in South Florida with an African-American VAP of 40.34 percent.

The modified De Grandy plan of course contained minor adjustments to district lines outside of Dade County in order to comply with the rule of "one person, one vote." Plaintiff De Grandy testified that:

> What we tried to do in the De Grandy Modified was to as much as possible enhance a little more the —a couple of the African-American seats while at the same time not impacting and trying to fit in the plan not impacting any other county than that which was impacted by Dade. That includes Dade; Monroe, which had a district in the Florida plan coming into Dade; Collier, which had a district in the Florida plan coming into Dade and Broward County.
>
> When you fit the plan, you have to not only fit the configuration, but also in terms of half the population of each district you have to deviate to comport with the plan you are fitting into. And while doing that, we also, when we were deviating that population tried to in effect, you know, boost our seats or minority seats more then they are in the De Grandy plan.
>
> So, basically, Your Honor, what we are really arguing is, Your Honors, please accept the De Grandy plan and accept it in the manner we have inserted it. That's what we are really arguing.

Tr. VIII-106-107. The plaintiffs are correct that in adopting a South Florida remedy adjustments must be made between what is in the Florida plan north of Dade and what the court adopts. The total enfranchisement of the minority populations in Dade County through creating a fair plan, causes a "ripple effect" into other counties leaving the problem of how to adjust the affected districts. The modified De Grandy plan minimized this "ripple effect" to eleven districts outside of Dade County. We find that the modified De Grandy plan best remedies the dilution of the Hispanic vote in South Florida while advancing the interests of African-Americans in South Florida. Accordingly, this court adopted the modified De Grandy plan as the court's plan and imposed that plan.

IV. CONCLUSION

This court issued orders following the completion of this case which carried out the conclusions expressed in this opinion. (Docs. 553 and 554). We held in our order imposing the 1992 Florida Senate Plan that the Florida Senate plan does not violate Section 2 of the Voting Rights Act of 1965, as amended. Doc. 553.) This language should be read as holding that the Florida Senate plan does not violate Section 2 such that a different remedy must be imposed. In other words, although the Florida Senate plan violates Section 2 of the voting rights act, it nevertheless is the best remedy to balance the competing minority interests in Dade County and the South Florida area. With respect to Florida's House of Representatives Districts we adopted the Modified De Grandy House of Representative Plan, Plan 268, as the court's plan and also impose that plan.

/s/ Joseph W. Hatchett
JOSEPH W. HATCHETT
United States Circuit Judge

/s/ William Stafford
WILLIAM STAFFORD
United States District Judge

/s/ Roger Vinson
ROGER VINSON
United States District Judge

Vinson, J., Concurring.

I join in the opinion, but set out separately my rationale for the result.

(1) Section 2 claims under the Voting Rights Act must meet the three-part test of *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S.Ct. 2752, 92 L.Ed.2d 25, 46-47 (1986): (a) a minority population that "is sufficiently large and geographically compact to constitute a majority" in a district; (b) a "politically cohesive" minority group; and (c) a white majority that "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."

(2) For Dade County, the second and third parts of the test are established by the overwhelming weight of the evidence in this case, subject to some variations among Hispanics from different counties of origin, and subject to the distinction that the Hispanic minorities are generally diametrically opposed to the voting preferences of the African-American minorities.

(3) Thus, the issue in both the challenge to the Florida Plan for the state Senate districts and for the state House districts in Dade County is a very narrow one: Have the plaintiffs established that the minority populations are sufficiently large and geographically compact to constitute a voting age majority in a district?

(4) Regarding the Senate challenge, the Hispanic plaintiffs established that they could have a fourth Hispanic-majority district that would be geographically compact, but only by either diluting the voting strength of African-American majority districts or by preserving such strength in districts that are not geographically compact. The African-American plaintiffs established that they could create a third African-American majority district only by using a district that was not geographically compact and which would also greatly dilute the

voting strength of Hispanics. Moreover, it is impossible to accommodate both four Hispanic and three African-American majority districts in any acceptable manner. Therefore, while the plaintiffs have established a Section 2 violation as to the four Hispanic districts, any remedy implementing the fourth district would violate Section 2 as to African-Americans. Thus, the existing Florida Plan for the Senate districts best accommodates the competing interests of both Hispanics and African-Americans.

(5) Regarding the House challenge, the plaintiffs have established in the De Grandy plan that eleven districts can be established in which Hispanics constitute over 64% of the voting age population and which are geographically compact. Further, these districts can be drawn without any dilution of African-American voting strength. Therefore, plaintiffs have established all requisites of their Section 2 claim as to the Dade County districts for the House of Representatives.

(5) (a) The defendants have attempted to show that it is the *citizen* Hispanic voting age population that is determinative. That Hispanic citizenship data is not available, however. Despite the lack of available data, the defendants presented estimates of Hispanic citizenship and attempted to apply them to the individual districts. Those estimates are unreliable. For example, William De Grove's analysis was based on a somewhat unorthodox regression analysis methodology that gave a range of non-citizenship rates of 9.5% for precincts with no Hispanics to 55% for precincts with 100% Hispanic voters. (Acknowledging, of course, that there is no such precinct.) He recognized that the error in that analysis was greatest at the extremes, i.e. at the 9.5% and 55% intercepts. Nevertheless, he used the 55% as the basis of all his citizenship calculations. Plainly, his estimated Hispanic citizenship ratios for the eleven districts must be viewed with low confidence and with a large range of error.

(5) (b) A better gauge of eligible voters within a district is the analysis of past election results. Those statistics established that Hispanics would be able to elect Hispanic candidates of choice in all eleven districts proposed by plaintiffs, and those statistics automatically account for voter citizenship, registration, and turn out. Thus, in the absence of any better data, the plaintiffs' evidence is sufficient. Further, Dr. Allan Lichtman's calculations for the plaintiffs, based in part on the defendants' citizenship data estimates, reflected an Hispanic voting age citizenship of 50% or more in all of the questioned eleven districts. This is a more relevant calculation, for the supermajority percentages are merely designed to account for, *inter alia*, citizenship.

(5) (c) Equally important, it is unrefuted that Hispanics have been able to elect the Hispanic candidate of choice in every district in which Hispanics constitute 59% or more of the voting age population (without regard to citizenship). It is not necessary to target anything greater than that. Nor is it necessary, although it may be desirable, to create a supermajority of 65% Hispanics (or 55% African Americans) to accomplish Section 2's purposes. Additionally, the growth trends in Dade County's Hispanic population indicate that the percentage of Hispanics will continue to increase, but the plaintiffs' Section 2 claims have been evaluated only on the basis of the 1990 census data. That data clearly establishes that the eleven districts meet the *Gingles* test.

(6) The remedial aspect of this court's adoption of the modified De Grandy plan presented a major challenge. In recognition of the respect due to the state's own policy and plan for redistricting, this court considered the defendants' two submitted plans, neither of which was even close to meeting Section 2's requirements and incorporating eleven Hispanic districts in Dade County in accordance with this court's findings on liability. At plaintiffs' suggestion, this court then requested that the de-

fendants draw a plan that incorporated the De Grandy plan for Dade County into the rest of the state. The defendants refused, however, and the court recessed to consider all of the alternatives available and make a decision. Because of the severe time constraints and the upcoming July 4th holiday weekend, it was critical that a plan be adopted without further delay. It was also apparent that the defendants were intent on delaying the adoption of any plan that implemented a true eleven-Hispanic districts House plan for Dade County. Accordingly, this court adopted the modified De Grandy plan. It does, of course, have a "ripple effect," but that effect is relatively minor and simply cannot be avoided. The defendants' belated change or position and announcement that they would attempt to draw a plan incorporating the eleven Hispanic districts from the De Grandy plan into the rest of the state came too late.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TCA 92-40015-WS

MIGUEL DE GRANDY, MARIO DIAZ-BALART, ANDY IRELAND, CASIMER SMERICKI, VAN B. POOLE, TERRY KETCHEL, ROBERTO CASAS, RODOLFO GARCIA, JR., LUIS ROJAS, LINCOLN DIAZ-BALART, JAVIER SOUTO, JUSTO LUIS POSO, ALBERTO CARDENAS, REY VELAZQUEZ, LUIS MORSE, ALBERTO GUTMAN, KAREN E. BUTLER, SGT. AUGUSTA CARTER, JEAN VAN METER, ANNA M. PINELLAS, ROBERT WOODY, GINA HAHN, BILL PETERSEN, TERRY KESTER, MARGIE KINCAID, and BROOKS WHITE,

Plaintiffs,

v.

T.K. WETHERELL, in his official capacity as Speaker of the Florida House of Representatives, GWEN MARGOLIS, in her official capacity as President of the Florida Senate, LAWTON CHILES, in his official capacity as Governor of the State of Florida, JACK GORDON, in his official capacity as Chairman of the Senate Reapportionment Committee, PETER R. WALLACE, in his official capacity as Chairman of the House Reapportionment Committee, JIM SMITH, in his official capacity as Secretary of State of Florida, ROBERT BUTTERWORTH, in his official capacity as Attorney General of Florida,

Defendants.

Civil Action No. 92-40131

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, T. H. POOLE, SR., WHITFIELD JENKINS, LEON W. RUSSELL, WILLYE DENNIS, TURNER CLAYTON, RUFUS BROOKS, VICTOR HART, KERNA ILES, ROOSEVELT WALTERS, JOHNNIE MCMILLIAN, PHYLLIS BERRY, MARY A. PEARSON, MABLE BUTLER, IRIS WILSON, JEFF WHIGHAM, AL DAVIS, PEGGY DEMON, CARLTON MOORE, RICHARD POWELL, NEIL ADAMS, LESLIE MCDERMOTT, ROBERT SAUNDERS, SR., IRV MINNEY, ADA MOORE, ANITA DAVIS, and CALVIN BARNES,

Plaintiffs,

v.

LAWTON CHILES, in his official capacity as Governor of Florida, JIM SMITH, in his official capacity as Secretary of State of Florida, ROBERT BUTTERWORTH, in his official capacity as Attorney General of Florida, GWEN MARGOLIS, in her official capacity as President of the Florida Senate, T. K. WETHERELL, in his official capacity as Speaker of the Florida House of Representatives, JACK GORDON, in his official capacity as Chairperson of the House Reapportionment Committee, and PETER R. WALLACE, in his official capacity as Chairman of the House Reapportionment Committee,

Defendants.

OPINION

[Filed May 29, 1992]

Florida currently has nineteen members in its congressional delegation. According to the 1990 federal decennial census, increases in Florida's population entitle Florida to four additional members in the United States House of Representatives. Thus, the number in Florida's congressional delegation has increased to twenty-three.

According to the 1990 census data, the total population of the state of Florida is 12,937,926 persons. Between the census of 1980 and the census of 1990, Florida's population increased 3,213,602 persons. To achieve equality between Florida's twenty-three districts, each district would ideally contain 562,518.5 persons. Seven Florida counties have a population greater than the ideal population of 562,518.5 persons. Those counties are: Broward, Dade, Duval, Hillsborough, Orange, Palm Beach, and Pinellas.

A longstanding general history of official discrimination against minorities has influenced Florida's electoral process. In 1885, Article VI, Section 8 of the Florida Constitution imposed a poll tax which disenfranchised poor minority voters. Additionally, Article XII, Section 12 of the 1885 Florida Constitution segregated African-American and white school children. Article XXVI, Section 24 of that same Florida Constitution also outlawed the intermarriage of white with African-Americans. As recently as 1967, § 350.20, Fla. Stat. provided in part: "The Florida Public Service Commissioners may prescribe reasonable rules and regulations relating to the separation of white and colored passengers in passenger cars being operated in this state by any railroad company or other common carrier." Additionally, § 1.01(6), Fla. Stat. (1967) provided that "the words 'Negro,' 'colored,' 'colored persons,' 'mulatto,' or 'persons of color,' when applied to persons, include every person having one-eighth or more of African or Negro blood." Federal precedent has also addressed numerous recent discriminatory election practices in Florida, including at-large election schemes, white primaries, majority vote requirements, and candidate filing fees. Such official state discrimination has adversely affected the ability of minorities to participate in the political process.

The parties agree that racially polarized voting exists throughout Florida to varying degrees. The results of Florida's legislative elections over the past ten years es-

tablished the presence of racially polarized voting. *See In re Constitutionality of Senate Joint Resolution 2G Special Apportionment Session 1992*, No. 79-674, slip op. at 34-37 (Fla. May 13, 1992) (Chief Justice Shaw, dissenting). In areas such as education, employment and health care, Florida's minorities have borne the effects of discrimination. The 1990 census figures demonstrate that among persons sixteen years or older, African-Americans are more than twice as likely to be unemployed as whites. In Florida, the poverty rate for African-Americans is more than three times higher than the rate for whites. Additionally, we note that voting studies have consistently indicated the strong relationship between socio-economic status and political participation. Thus, the legal barriers and the economic barriers which the legacy of racism has created in the state of Florida, have prevented African-Americans from fully participating in the political process.

In the state of Florida, minorities have had very little success in being elected to either the United States Congress or the Florida Legislature. An African-American has not represented Florida in the United States in over a century. In addition, only one Hispanic congressperson serves from Florida. From 1889 until 1968, African-Americans were unable to elect a single representative to the state house. Additionally, African-Americans were unable to elect a representative to the state senate until ten years ago. Until four years ago, no Hispanic state senator had ever been elected in Florida. *See In re Constitutionality of Senate Joint Resolution 2G*, No. 79-674 at 34-37 (Chief Justice Shaw, dissenting).

As a result of Florida's past discrimination practices, the United States Justice Department must preclear five Florida counties pursuant to Section 5 of the Voting Rights Act, as amended. *See* 42 U.S.C. § 1973 *et seq.* Those counties are: Collier, Hardee, Hendry, Hillsborough, and Monroe. The Florida Constitution does not

provide a method for congressional redistricting if the the state legislature fails to pass a redistricting plan, or the United States Justice Department fails to preclear a plan the state legislature adopted.

Pursuant to the Florida Statutes, candidates seeking federal office in Florida must qualify between July 6 and July 10, 1992. The first primary election is scheduled to occur on September 1, 1992. The general election is scheduled to occur on November 3, 1992. Given this set of circumstances, the plaintiffs filed the following action.

PROCEDURAL BACKGROUND

On the opening day of the 1992 Florida legislative session, Miguel DeGrandy, a member of the Florida House of Representatives, and other registered voters ("DeGrandy plaintiffs") filed a complaint against the Speaker of the Florida House of Representatives, the President of the Florida Senate, the Governor of Florida, and other state officials. The DeGrandy plaintiffs filed the complaint in the District Court for the Northern District of Florida challenging the constitutionality of Florida's current congressional and state legislative districts. The DeGrandy plaintiffs alleged that the current districts violate both the Equal Protection Clause of the United States Constitution and the Voting Rights Act of 1965, as amended, and urged this court to assert jurisdiction in order to redistrict and reapportion the state.[1] *See* 42 U.S.C. § 1973 *et seq.*

The DeGrandy plaintiffs filed a first amended complaint on January 23, 1992. The defendants moved to dismiss the complaint. After hearing arguments on the

[1] In this order, the term "redistricting" refers to the process of drawing new congressional districts, while the term "reapportionment" describes the process of redistricting state house and senate seats. *See* Bryant, Giddings & Kaplan, *Partisan Gerrymandering A New Concern for Florida's 1992 Reapportionment*, 19 Fla. St. U.L. Rev. 265, 265 n.3 (1991).

motion, the court dismissed the action due to lack of subject matter jurisdiction. On March 9, 1992, the DeGrandy plaintiffs filed a second amended complaint. On March 13, 1992, the Florida Legislature ended its regular session without adopting either a congressional redistricting or a state reapportionment plan.

Subsequently, on March 27, 1992, this three-judge court convened and denied all motions to dismiss and established an expedited scheduling order to adopt congressional and state legislative plans by May 29, 1992. This scheduling order in no way enjoined or prevented state redistricting and reapportionment agencies from attempting to enact their own plans. When this court issued the expedited scheduling order, however, we were concerned that the state legislature would be unable to pass a congressional redistricting plan and have the Justice Department preclear that plan in time for the scheduled candidate qualification date of July 6, 1992. This court was particularly concerned that minority voters would not be able to participate meaningfully in the political process and adequately decide on a candidate of their choice given the time constraints of the redistricting process. The absence of a meaningful opportunity for minorities to participate in the political process and elect a candidate of their choice constitutes a violation of section 2 of the Voting Rights Act. Further, none of the parties presented evidence or testimony to this court indicating that the Florida legislature would convene and adopt a congressional redistricting plan in time for the July 6 qualifying date.

In fact, on April 2, 1992, the Governor of Florida, Lawton Chiles, called a special redistricting and reapportionment session of the Florida Legislature pursuant to Article III, Section 16, of the Florida Constitution. While the legislature could not agree on a congressional redistricting plan, it did adopt Senate Joint Resolution 2-G reapportioning state House and Senate districts.

Meanwhile, this case progressed and the court consolidated with it a similar lawsuit that the Florida State Conference of the NAACP Branches and many individual African-American voters filed on April 7, 1992. The court also granted many persons and organizations leave to intervene or act as amicus curiae. Those acting as amici are: Simon Ferro, State Chairman of the Florida Democratic Party; Common Cause; Florida AFL-CIO; United States Representative Craig James; The Cuban American Bar Association; The Coalition of Hispanic Women; and State Representative Daniel Webster. Plaintiff-intervenors include: Gwen Humphrey; State Representative Darryl Reaves; United States Representative Jim Bacchus; and United States Representative Andy Ireland. State Representative Alzo Reddick is a defendant-intervenor.

In order to facilitate taking evidence concerning the many proposed congressional plans, the court appointed The Honorable C. Clyde Atkins, Senior United States District Judge, Southern District of Florida on April 6, 1992, to serve as Special Master. The court charged the Special Master with the task of considering and evaluating congressional redistricting and legislative reapportionment plans for Florida in a short period of time.

Subsequently, on April 17, 1992, Robert Butterworth, the Attorney General of the State of Florida, submitted Senate Joint Resolution 2-G concerning state legislative reapportionment to the United States Justice Department for preclearance pursuant to Section 5 of the Voting Rights Act. That same day, this court issued an order bifurcating the congressional redistricting and state reapportionment hearings and setting an amended schedule. The parties stipulated that Florida's current congressional district lines are malapportioned. We held on April 30, 1992, that Florida's existing congressional plan is unconstitutional. On May 13, 1992, the Florida Supreme Court validated Senate Joint Resolution 2-G. As a result of the validation, this court stayed proceedings related to state reapportionment.

Meanwhile, on April 24, 1992, the Special Master appointed Professor M. David Gelfand as an Independent Expert and instructed him to consider and evaluate the redistricting plans proposed. Additionally, the Special Master charged the Independent Expert with either recommending one of the parties' plans, or formulating one himself. The Special Master conducted a full week of hearings in which he accepted plans into evidence and heard expert testimony concerning the proposed redistricting plans. Ultimately, on May 14, 1992, Professor Gelfand submitted his report to the Special Master in which he recommended for adoption Independent Expert Plan 308, a combination of several plans the parties submitted.

On May 15, 1992, the parties cross-examined Professor Gelfand concerning his proposed redistricting plan. The Special Master then conducted an evaluation of the plans and submitted his report to this court on May 18, 1992. The Special Master recommended Independent Expert Plan 308.

This court held a hearing on May 27, 1992, to hear the parties' objections to the Special Master's report. Having considered all the evidence submitted concerning Florida's congressional redistricting, the court adopts the Special Master's findings of fact and conclusions of law. The court notes that the Special Master did an outstanding job of analyzing the evidence and testimony, recommending a plan that will enable minorities to participate in Florida's electoral politics and to elect candidates of their choice. For his effort, this court is grateful. We emphasize, however, that the Special Master did not have final approval of the redistricting of Florida. After many hours of study, this court independently determined that the Special Master's recommended plan should be adopted, which we now call the 1992 Florida Redistricting Plan.[2]

[2] See Appendix A (map of the adopted plan); Appendix B (accompanying curative rules regarding contiguity); Appendix C (Special Master's Report and accompanying attachments, including the Independent Expert's Report. Note, however, that Independent Expert's Exhibits 2A, 2B, and 3 are not attached to this Order. Independent Expert's Exhibits 2A and 2B, the Technical Plan Descriptions, are attached to the Judgment).

The remainder of this order is divided into seven parts. Part I summarizes the law the court applies in this case. Part II evaluates the plans the parties submitted. Part III contains a discussion of the expert witnesses' proposed plan. Part IV summarizes objections made to the Special Master's Report. Part V expressly incorporates the Special Master's and Independent Expert's Reports. Part VI contains this court's conclusions regarding the congressional redistricting plans. Lastly, Part VII certifies that the 1992 Florida Redistricting Plan is a final judgment pursuant to rule 54(b).

PART I—LEGAL PRINCIPLES

The Voting Rights Act

The Voting Rights Act arose as a remedy to racially discriminatory election practices, particularly in the South. Enactment of the Fifteenth Amendment after the Civil War eliminated many statutory obstacles to African-American voting. Nonetheless, state and local officials soon utilized impediments to voter registration as a means of denying African-Americans the right to vote. In the early 1960's, the United States Justice Department challenged the use of literacy tests in voter registration on a case-by-case basis. Because this approach proved ineffective, Congress passed the Voting Rights Act in 1965. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 27 (1982) (Senate Report on 1982 amendments to the Voting Rights Act), *reprinted in* 1982 U.S.C.C.A.N. 177 [hereinafter "Senate Report"]. As Senator Jacob Javits stated, the purpose of the Voting Rights Act was "not only to correct an active history of discrimination, the denying to [African-Americans] of the right to register and vote, but also to

deal with the accumulation of discrimination . . . . The bill would attempt to do something about accumulated wrongs and a continuance of the wrongs." Senate Report at 182.

The two central provisions of the Voting Rights Act are section 2 and section 5. Section 2 forbids any "state or political subdivision" from imposing or applying any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color," or membership in a language minority. 42 U.S.C. § 1973(a). Section 5 contains the requirement that any change in voting qualifications, prerequisites, standards, practices, or procedures of certain covered states or political subdivisions must be "precleared" by the United States Justice Department. The Justice Department will only preclear plans that are not discriminatory in purpose and effect. *See* 42 U.S.C. 1973 (c).

1982 Amendments

Pre-1980, the Supreme Court held that plaintiffs could prevail in Voting Rights Act suits by establishing that a challenged law or procedure resulted in denying a racial or language minority equal participation in the electoral process. Under this result-oriented test, the court looked at the totality of the circumstances surrounding the local electoral process to determine whether a Voting Rights Act violation occurred. It was unnecessary, however, for a plaintiff to show that the challenged law or procedure was either designed or maintained to effectuate a discriminatory purpose.

In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), a plurality of the Supreme Court increased the plaintiff's burden of proof in Voting Rights Act cases by requiring plaintiffs to prove a discriminatory intent on the part of

the legislators who enacted the challenged laws or procedures. Congress found this new burden of proof unacceptably difficult for Voting Rights Act plaintiffs and amended section 2 in 1982. *See* Pub. L. No. 97-205, 96 Stat. 131, 134 (1982). The amendment allowed plaintiffs to prove section 2 violations by demonstrating that minorities were denied an equal chance to participate in the electoral process based on the totality of the circumstances. Thus, Congress essentially codified the result-oriented test used in pre-*Bolden* cases. The amendment specifically provided, however, that it was not to be read to require proportionate representation. Plaintiffs demonstrate a violation of the Act only when equal access to the political process has been denied.

To determine whether minorities have an equal opportunity to participate in the political process and to select candidates of their choice, the Senate Report accompanying the amended section 2 delineated several objective factors that should be considered. These objective factors include:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the election of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group. And whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

See Senate Report at 206-07 (citing *White v. Regester*, 412 U.S. 755 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973)). Under the 1982 amendment to section 2, a plaintiff may prove a violation of the Act if a proposed redistricting plan dilutes minority voting strength. *See Jeffers v. Clinton*, 730 F. Supp. 196, 204 (E.D. Ark. 1989), *aff'd* 111 S. Ct. 662 (1991); *Jordan v. Winter*, 604 F. Supp. 807, 811-12 (N.D. Miss. 1984).

The Supreme Court first applied the 1982 amendment in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In *Gingles*, plaintiffs challenged existing multi-member state legislative districts. The Court held that plaintiffs must prove three threshold criteria when challenging an at-large system: (1) the minority group is sufficiently large and

geographically compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive; and (3) the minority's preferred candidate is usually defeated by white bloc voting. *Gingles*, 478 U.S. at 50-51.

Gingles, while helpful, is not dispositive of this case because this case does not involve a traditional section 2 challenge to an existing plan. *See In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, No. 79-674, slip op. 3, 29 (Fla. May 13, 1992) (Shaw, C.J. dissenting). Although the absence of an existing plan prevents the court from engaging in the factually intensive analysis of a traditional section 2 challenge, this court must consider in crafting the redistricting plan the section 2 requirement of ensuring that the plan does not dilute the votes of racial or language minorities. The Supreme Court has held that "it is imperative for the district court, in drawing up a new plan, to make every effort not only to comply with the established constitutional standards, but also to allay suspicion and avoid the creation of concerns that might lead to new constitutional challenges." *Connor v. Finch*, 431 U.S. 407, 425 (1977).

Court-ordered Plans

While it is the duty of the legislature to redistrict the state, when the legislature is unable to adopt a redistricting plan, the obligation of devising a redistricting scheme falls upon the courts. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). Two primary factors guide this court in evaluating proposed redistricting plans: (1) population equality (one person-one vote); and (2) the racial fairness of the plan. *See Hastert v. State Bd. of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991); *Major v. Treen*, 574 F. Supp. 325, 342 n.22 (E.D. La. 1983).

To satisfy the one person-one vote requirement, this court must draw the state's congressional districts so

that their populations are equal. *See Wesberry v. Sanders*, 376 U.S. 1 (1964) (interpreting U.S. Constitution, art. I, sec. 2). In drawing Florida's congressional districts, this court must seek to avoid *de minimis* deviations from exact population equality unless the deviations are necessary to achieve some critical state objective. *See Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (rejecting deviation of less than .07 percent); *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) (only those population variances "which are unavoidable despite a good faith effort to achieve absolute equality or for which justification is shown" will be accepted). Because several plans have been introduced in this case bearing a minimum deviation of one person or .000177 percent, this court must adopt a plan which meets this standard unless greater deviation is necessary to ensure racial fairness. *See Hastert*, 777 F. Supp. at 644.

In analyzing the racial fairness factor, the voting age population (VAP) is the relevant number to be used in determining whether minorities in a particular district will be able to elect a candidate of their choice. *See Solomon v. Liberty County*, 899 F.2d 1012, 1018 (11th Cir. 1990) (*en banc*), *cert. denied*, 111 S. Ct. 670 (1991). Further, because Hispanic communities are characterized by a large number of noncitizens and lower voter registration rates, a super majority of the VAP is necessary to create districts in which Hispanics can elect candidates of their choice. This court must ensure that a court-imposed plan does not dilute the votes of racial or language minorities. *See* Senate Report at 204.

This court should also consider issues of possible retrogression affecting the five Florida counties which come under the protection of section 5 of the Voting Rights Act. Although the Supreme Court has held in *McDaniel v. Sanchez*, 452 U.S. 130, 138 (1981), that court-ordered congressional redistricting plans need not be precleared,

the court should consider whether the changes proposed in a redistricting plan make members of racial or language minorities in the five protected counties worse off than they were before the change in terms of their ability to participate effectively in the electoral process. *See Beer v. United States*, 425 U.S. 130 (1976); *see also City of Lockhart v. United States*, 460 U.S. 125 (1983).

In addition to the constitutional requirement of one person-one vote and the statutory requirements of section 2 and section 5 of the Voting Rights Act, the court has considered the following permissive criteria in evaluating redistricting plans: contiguity, compactness, respect for traditional boundaries, maintaining communities of interest, and party competitiveness. Under Florida law, a "district lacks contiguity only when a part is isolated from the rest by the territory of another district." *In re Apportionment Law*, 414 So. 2d 1040, 1051 (Fla. 1982). Although no federal or state requirement that congressional districts be contiguous exists, contiguity is appropriate. *See Dunnell v. Austin*, 344 F. Supp. 210, 215 (E.D. Mich. 1972); *David v. Cahill*, 342 F. Supp. 463, 469 (D.N.J. 1972). With regard to compactness, the district court in *Dillard v. Baldwin County Bd. of Education*, 686 F. Supp. 1459, 1466 (M.D. Ala. 1988) correctly pointed out that

> the degree of geographical symmetry or attractiveness is therefore a desirable consideration for districting but only to the extent it aids or facilitates the political process, and only as one among many considerations a court should include, the principal one being section 2's vote dilution prohibition in determining whether there is sufficient compactness for a majority [minority] district.

Dillard, 686 F. Supp. at 1466. Thus, the proper focus of any geographic compactness analysis is upon the size and relative concentration of the minority population,

rather than upon the size or shape of the district. Additionally, although respecting traditional county boundaries is a desirable approach, this aesthetic requirement should not undercut the primary goal of creating minority districts. The consideration of communities of interest is also relevant to the determination of compactness. If a district is so spread out that no sense of community exists, then that district is not sufficiently compact. *See Dillard*, 686 F. Supp. at 1466. However, members of a minority group who live in separate enclaves may still be included in a single district where it can be shown that they constitute a single community having similar interests. *See Hastert*, 777 F. Supp. at 649. Finally, maintaining party competitivenss in Florida's congressional districts is an important goal because Florida has developed into a strong two-party state.

II. EVALUATING THE PLANS UNDER THE GUIDELINES

General Considerations

Like the Special Master, we conclude that "the law supports the drawing of a minority district where, in light of minority concentrations and community of interests, such a district can reasonably be drawn." Report of the Special Master at 14. All the proposed congressional redistricting plans contain at least one African-American VAP district and two Hispanic super majority VAP districts. Thus, the inquiry becomes whether a second African-American VAP district is necessary, and whether African-American "influence" districts should also be included in the plan.

The parties and the *amici curiae* take two different approaches to the creation of African-American districts. On the one hand, four of the proposed plans create two African-American districts with a VAP majority. On the other hand, several of the plans create only one African-American district with a VAP majority, but

also create two or three other districts with respectable African-American voting age populations. These districts, with substantial minority concentrations comprising less than fifty percent of the VAP are commonly referred to as influence districts. Proponents of the plans which include influence districts argue that it is more desirable for African-Americans to have influence in several districts rather than constituting a majority in only two districts.

We believe the second approach, which fractures the African-American community into influence districts, would merely continue the past dilution of minority voting strength. Where, in a statewide redistricting case such as the present one, this court can reasonably draw a majority-minority district, we cannot choose to create an influence district or districts. *Compare Brooks v. Winter*, 461 U.S. 921 (1983) (vacating three-judge court's influence district remedy and remanding for reconsideration in light of amendments to section 2) *with Mississippi Republican Executive Comm'n v. Brooks*, 469 U.S. 1002 (1984) (affirming use of majority African-American district as remedy); *see also United States v. Dallas County Comm'n*, 850 F.2d 1433, 1439-42 (11th Cir. 1988) (vacating district court's remedy, which included one at-large influence district, and adopting instead a plan which included five single-member districts, including two African-American districts, two white districts, and one African-American "swing" district), *cert. denied*, 490 U.S. 1030 (1989). The approach of fracturing the African-American community in order to create influence districts does not further Congress's intent of completely remedying the prior dilution of minority voting strength and providing a meaningful opportunity to participate in the political process. *See* Senate Report *supra* at 31. It is not enough for minority groups to be able to influence elections because, under the Voting Rights Act, they must be able to determine the outcome of elections and elect representatives of their choice. *See* 42 U.S.C. § 1973(b) (1982). As the Seventh Circuit noted, "[t]here is simply

no point in providing minorities with a 'remedy' for the illegal deprivation of their representational rights in a form which will not in fact provide them with a realistic opportunity to elect a representative of their choice." *Ketchum v. Byrne*, 740 F.2d 1398, 1413 (7th Cir. 1984).

Specific Plans

The Florida State Conference of NAACP Branches submitted a plan which contains two African-American voter age population majority districts. The NAACP plan also contains an African-American influence district and two Hispanic super majority districts. Although this approach is sound, the plan's deviation of 0.02 from absolute population equality makes it unacceptable as a court-ordered plan.

Gwen Margolis, President of the Florida Senate, submitted a plan which proposed two African-American majority districts and two super majority Hispanic districts. The weakness of the Margolis plan lies in its method of forming the two south Florida Hispanic districts. The plan creates the districts by combining Dade County Hispanic neighborhoods with areas in predominantly non-Hispanic adjacent counties. The division of Dade's Hispanic neighborhoods among five congressional districts seriously damages the community of interest of these neighborhoods. Additionally, the plan includes areas of high white growth in the Hispanic districts, reducing the likelihood that Hispanics will be able to elect candidates of their choice.

Congressman Andy Ireland submitted a plan which creates two African-American majority districts, one African-American influence district, and two super majority Hispanic districts. The Ireland plan's African-American majority district in central Florida is extremely long, irregularly shaped, and extends from Palm Beach County in south Florida to Volusia County in central Florida, and from St. Lucie County on the Atlantic Coast to Pinellas County on the Gulf Coast. This

long, irregularly shaped district traverses parts of seventeen counties and involves three major media markets. The communities linked in this sprawling district are likely to have competing interests and do not constitute communities of interest. Additionally, the district contains several areas in which the rate of growth in the white community is expected to be large. Thus, it is doubtful that the African-American community will be able to maintain the 50.1 percent voter age population majority.

Congressman Craig T. James submitted a plan which provides for two African-American majority districts and no influence districts. The James plan creates two Hispanic super majority districts in Dade County. The basic thrust of the James plan was to maintain the present district structure where possible and to leave incumbent districts in tact. The plan's major deficiency is that it packs African-Americans into two strong majority districts but creates no influence districts.

Miguel DeGrandy, an Hispanic member of the Florida House of Representatives, sponsored a plan which establishes a single African-American majority VAP district, three African-American influence districts, and two Hispanic super majority VAP districts. The DeGrandy plan has several disadvantages. First, it provides for only one African-American majority VAP district. Second, the plan's sprawling influence district in central Florida links together populations in the Tampa and Orlando areas likely to have competing interests.

The Humphrey intervenors, a group of African-American citizens, sponsored a plan which is identical to the first plan sponsored by State Reps. Reeves, Brown, and Hargrett. Collectively, these plans are referred to as the Lawyer's Committee plans. The Lawyer's Committee plans form an African-American majority district in the south, with influence districts in the northern, central, and southern areas of the state. Additionally, the plans

form two Hispanic super majority districts in the southern portion of the state. The Lawyer's Committee plans contain the same disadvantages as the DeGrandy plan, in that they only provide for one African-American VAP majority district, while other plans have demonstrated that two or more are possible.

Common Cause, a national public advocacy group, sponsored a plan which contains one African-American super majority district, one African-American influence district, and two super majority Hispanic districts. Although the Common Cause plan achieves the minimum possible deviation from the requirement of one person-one vote, Common Cause's strict adherence to county boundaries prevented it from creating a second district with an African-American voter age population majority. This second African-American majority district, as other plans have demonstrated, can be created while still achieving the minimum deviation. Common Cause's demographer and expert admitted that the Common Cause plan was not the best plan and recognized that its principal shortcoming was its failure to create more minority districts.

T.K. Wetherell, Speaker of the Florida House of Representatives, submitted a plan which has one African-American VAP majority district, two African-American influence districts, and two Hispanic super majority districts. In drafting the Wetherell plan, members of the Florida House of Representatives placed policy considerations ahead of strictly legal ones. Thus, the plan elevates the secondary criteria of compactness, coherent communities of shared interest, and respect for traditional political boundaries over the primary principle of ensuring that minority voting strength is not diluted.

Jack Gordon, Chairman of the Florida Senate Committee on Reapportionment submitted a plan which creates one African-American and two Hispanic majority districts in south Florida. The Hispanic districts are nearly identical to the Hispanic districts in the Margolis plan. The

Gordon Plan, like the Margolis plan, decreases the access of Dade County Hispanics to the political process because it splits the Hispanic population among five congressional districts extending beyond Dade County. Additionally, the Gordon plan fails to draw a second African-American majority district.

State Rep. Alzo Reddick submitted a plan which creates one African-American majority district in south Florida, an African-American influence district in North Florida, and two Hispanic majority districts located primarily in Dade County. The Reddick plan minimizes the ability of minority groups, particularly African-Americans, to participate in the political process. Specifically, the Reddick plan creates only one African-American majority district and one African-American influence district with a small African-American voter age population of 36.3 percent.

Daniel Webster submitted a plan which creates only one African-American majority district and two Hispanic super majority districts. The Webster plan perpetuates the traditional dilution of African-American voting strength by keeping African-American voters submerged in heavily white districts.[3]

In light of the deficiencies of all the plans, the expert witness proposed his own plan for the Special Master's consideration and adoption.

III. EXPERT PLAN 308

The independent expert assembled his plan (Plan 308) from key portions of other plans, in particular the DeGrandy plan, the Common Cause plan, the Margolis plan, and the NAACP plan. The expert plan takes the NAACP and DeGrandy approach of creating two African-American majority districts, plus one influence African-Ameri-

[3] The AFL-CIO also submitted a plan, but withdrew the plan in light of its similarities to the Reddick and Gordon plans.

can district. Additionally, the expert's plan follows the DeGrandy approach with some modification in south Florida, keeping Cuban-American communities together and creating two Hispanic super majority districts, plus one African-American majority district, in Dade County. The expert pointed out that his plan follows the lead of the Margolis plan with respect to the African-American majority district in north Florida. However, the plan makes changes in that district based upon the NAACP plan. Additionally, the expert witness points out that the plan generally follows the Common Cause approach to central Florida.

Districts 18 and 21 are the two super majority Hispanic districts in the expert's plan. District 18 has a Hispanic VAP of 67.5 percent, and District 21 has a Hispanic VAP of 70.6 percent. These are reasonable numbers for an effective Hispanic district. Districts 3 and 17 are the two African-American majority VAP districts in the expert's plan. District 17, in Dade County has a total African-American population of 58.4 percent, VAP of 54 percent, and registration of 59.3 percent. District 3 has an African-American total population of 55 percent, VAP of 50.6 percent, and registration of 50.6 percent. In addition, the expert's plan creates an African-American influence district. District 23, which has a substantial African-American voter age population of 45.7 percent.

In considering retrogression under section 5, we note that the expert's plan is a state-wide congressional redistricting plan in which the districts must all have the same population. Thus, no single district can be examined or changed in isolation. The expert's plan increases both Hispanic and African-American political representation when the Florida congressional delegation is considered as a whole. The minority populations of districts have shifted, so that minority populations are now lower in some districts and higher in others. Nevertheless, the plan overall substantially increases the level of political

participation and electoral representation for the members of minority groups in Florida. Additionally, expert plan 308 is politically competitive.

PART IV—OBJECTIONS

The DeGrandy plaintiffs "generally accept" the Special Master's plan. They contend, however, that the creation of two African-American influence districts in northern and central Florida under their plan better serves the purposes of the Voting Rights Act. They argue that African-Americans living in the Tampa Bay area and between Jacksonville and Tallahassee achieve a level of influence under the DeGrandy plan lacking under the Special Master's plan.

Plaintiff intervenors Reeves, Brown, and Hargrett agree that the Special Master's plan meets the requirements of the Constitution and the Voting Rights Act. They argue, however, that their own plan (212) is superior. Without explanation, they disagree with the Special Master's treatment of central Florida. In north Florida, they support the creation of a majority-minority district which includes African-Americans from Jackson County to Duval County.

Plaintiff intervenor Rep. Andy Ireland recognizes that the Special Master's plan meets the requirements of the U.S. Constitution and the Voting Rights Act. He contends, however, that the plan fails to meet certain neutral redistricting criteria. *See generally Arizonans for Fair Representation v. Symington*, No. Civ. 92-256-PHX-SMM (D. Ariz. April 30, 1992). Ireland proposes three changes to correct these errors. First, he argues that the borders of Districts 9, 5, and 12 should be modified so that relatively developed western Pasco County moves into District 9, while rural parts of Pasco County move into District 5. These minor adjustments will preserve communities of interest, one of the three neutral criteria mentioned in *Arizonans*. *See also Carstens v. Lamm*, 543 F. Supp. 68, 88 (D. Colo. 1982). Second, Ireland proposes adjusting

the borders of Districts 16, 22, and 23 to avoid the unnecessary "out-districting" of incumbent Rep. Tom Lewis. *See Arizonans*, slip op. at 7; *South Carolina State Conference Branches of NAACP v. Riley*, 533 F. Supp. 1178, 1180-81 (D.S.C. 1982). Ireland's proposal would put Lewis's residence in District 16, the district most closely approximating his present district. Finally, Ireland proposes moving District 23 slightly to the west where it parallels District 22 in order to avoid splitting Boca Raton among three districts. Ireland contends that the court can make all three of these changes without compromising the constitutional and statutory integrity of the Special Master's plan.

Defendants Margolis and Gordon criticize the Special Master's plan for creating an African-American influence district in south Florida. They contend that the Voting Rights Act does not require influence districts, and several courts have specifically rejected them. *See, e.g., McNeil v. Springfield Park Dist.*, 851 F.2d 937 (7th Cir. 1988); *Turner v. Arkansas*, 784 F. Supp. 553 (E.D. Ark. 1991). Margolis and Gordon argue that the independent expert relied upon insufficient evidence in concluding that District 23 would be an effective minority influence district. They further argue that the expert failed to account sufficiently for demographic trends in District 17, the African-American majority district in south Florida. According to Margolis and Gordon, Hispanic immigration into District 17 will overwhelm the black majority VAP by the end of the decade. Accordingly, Margolis and Gordon support the creation of a majority-minority district in south Florida with a sixty-two percent African-American VAP, as compared to the Special Master's majority-minority district with a fifty-four percent African-American VAP.[4] They would achieve this higher

[4] Margolis argues that the Special Master's inclusion of black Hispanics in the African-American population figures for District 17 further overstates the African-American VAP for that district.

African-American VAP in the majority-minority district by eschewing a south Florida African-American influence district.

The Humphrey plaintiff intervenors contend that the Special Master's plan meets statutory and constitutional requirements. Much of their memorandum is devoted to defending the plan's treatment of south Florida against Margolis and Gordon's attack. The Humphrey intervenors argue that the Constitution and the Voting Rights Act require the creation of an African-American influence district in south Florida.[5] They further argue that any change in the Special Master's plan should be limited to increasing African-American representation in north and central Florida. They argue that their plan, creating two strong minority influence districts in those regions, is preferable to the Special Master's plan.[6]

The House defendants contend that the Special Master ignored the first requirement of the three-prong test in *Gingles*, 478 U.S. at 50-51. Specifically, the "grotesquely" shaped north Florida majority-minority district in the Special Master's plan (District 3) flaunts *Gingles*'s requirement that the African-American minority be "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50-51; *see also Jeffers*, 730 F. Supp. at 202 (applying

[5] The Humphrey intervenors disagree with the characterization of District 23 as a mere "influence" district. Although the African-American VAP in District 23 is less than fifty percent, the evidence showed that African-Americans will have the opportunity to elect candidates of their choice in that district. Thus, African-Americans will have more than "influence" in District 23.

[6] Again, the Humphrey intervenors are reluctant to characterize these districts as "influence" districts. Under the Humphrey intervenors' plan, Districts 3 and 7 would have African-American VAPs of 47.45 percent and 46.58 percent, respectively. According to Humphrey, the evidence showed that African-American voters in these north and central Florida districts would be able to elect the candidates of their choice.

Gingles test in single-member district case); *Turner v. Arkansas*, 784 F. Supp. 553, 568 (E.D. Ark. 1991) (same). District 3 is a political unit incapable of meaningful representation and indicates that the Special Master improperly sought to achieve proportional representation, contrary to the provisions of the Voting Rights Act. In south Florida, the House defendants argue that the Special Master's plan inappropriately focuses upon the creation of Cuban-American districts, rather than Hispanic districts. The Voting Rights Act makes no such distinctions among language minority sub-groups. Contrastingly, the House defendants' plan would draw two south Florida districts with Hispanic VAPs over sixty-five percent, without unnecessarily splintering Dade County's "Anglo, Jewish, and retirement" communities of interest. The House defendants further argue that the independent expert and Special Master inappropriately relied upon "party competitiveness" as the exclusive measure of fairness, ignoring other measures such a "political bias" and "seats votes/ ratio" [sic]. Finally, the House defendants contend that the independent expert and Special Master chose a "separatist" interpretation of the Voting Rights Act. They warn this court against using the Voting Rights Act to promote "political apartheid." (Quoting *Burton v. Sheehan*, slip op. at 50 n.47).

PART V—INCORPORATION OF DOCUMENTS

We expressly incorporate the Special Master's and Independent Expert's Reports. *See* Appendix C. We also expressly incorporate into this order the curative rules regarding contiguity. *See* Appendix B.

PART VI—CONCLUSION

After careful study and review of controlling precedent, redistricting plans submitted to the court, the Special Master's Report with attachments, and objections to the Special Master's Report, including oral argument, this

court declares the current congressional districts unconstitutional. Because the state of Florida does not have a scheme other than legislative passage of a congressional districting plan, the voters of Florida will suffer a deprivation of constitutional and statutory rights unless this court imposes a plan.

VII—CERTIFICATE

Pursuant to Rule 54(b), Federal Rules of Civil Procedure, the court determines that there is no just reason for delay in entry of judgment regarding congressional redistricting. Accordingly, by separate judgment, as required by law, this court orders the state of Florida to conduct the 1992 congressional elections and congressional elections thereafter in districts as shown by plan 308, which this court deems the "1992 Florida Redistricting Plan."

Dated at Tallahasse, Florida, this 29th day of May, 1992.

/s/ Joseph W. Hatchett
JOSEPH W. HATCHETT
United States Circuit Judge

/s/ William Stafford
WILLIAM STAFFORD
United States District Judge

/s/ Roger Vinson
ROGER VINSON
United States District Judge

APPENDIX E

SUPREME COURT OF FLORIDA

No. 79,674

IN RE: CONSTITUTIONALITY OF SENATE JOINT RESOLUTION 2G, SPECIAL APPORTIONMENT SESSION 1992

[May 13, 1992]

GRIMES, J.

This is an original proceeding in which the attorney general petitions this Court for a declaratory judgment determining the validity of Senate Joint Resolution 2G apportioning the legislature of the State of Florida. We have jurisdiction under article III, section 16(c) of the Florida Constitution, which provides:

> (c) JUDICIAL REVIEW OF APPORTIONMENT. Within fifteen days after the passage of the joint resolution of apportionment, the attorney general shall petition the supreme court of the state for a declaratory judgment determining the validity of the apportionment. The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment.

The Florida Legislature began preparing for the 1992 reapportionment in 1988. Each chamber hired separate expert technical staff and provided them with state-of-the-art computer systems. Committees on Reapportionment in both chambers were appointed in 1991 and

charged with the responsibility of aiding the legislature in developing legislative and congressional plans. The House and Senate cohosted 32 public hearings throughout the state between September 19, 1991, and December 4, 1991. Their purpose was to increase public awareness on reapportionment and to receive public input prior to the development or adoption of any redistricting or reapportionment plans.

Notwithstanding, the legislature was unable to agree on a plan of legislative reapportionment during the regular 1992 session. Pursuant to article III, section 16(a) of the Florida Constitution, the governor then reconvened the legislature in a special apportionment session. During that session, Senate Joint Resolution 2G was adopted. Three days later, on April 13, 1992, the attorney general filed this petition for review of the apportionment plan. Adversary interests have filed briefs presenting their views, and the matter has been orally argued before the Court.

In analyzing the validity of the reapportionment plan, we begin by addressing the issue of the plan's validity under the equal protection standard of one person, one vote. Equal protection requires that state legislatures be apportioned in such a way that each person's vote carries the same weight—that is, that each legislator represents the same number of voters. *Reynolds v. Sims*, 377 U.S. 533 (1964). This determination necessarily requires an analysis of population figures in each district.

Joint Resolution 2G apportions the state into 120 House districts and 40 Senate districts.[1] Florida's population is 12,937,926.[2] Therefore, the ideal population per single-

[1] All districts in both the House and the Senate are single-member districts.

[2] Population figures are those reported in the United States Decennial Census of 1990, upon which the legislature based the apportionment plan.

member House district is 107,816 (the total state population divided by 120 districts). The largest House district is District 80, with a population of 108,460—deviating from the ideal population by 644 people, or 0.60%. The smallest House district is District 111, with a population of 106,317—deviating from the ideal population by 1,499 people, or 1.39%. Therefore, the maximum percentage deviation between the largest and smallest number of people per representative (statistical overall range) is 1.99%.

The ideal population per single-member Senate district is 323,448 (the total state population divided by 40 districts). The largest Senate district is District 31, with a population of 324,815—deviating from the ideal population by 1,367 people, or 0.42%. The smallest Senate district is District 26, with a population of 322,007—deviating from the ideal population by 1,441 people, or 0.45%. Therefore, the maximum percentage deviation between the largest and smallest number of people per senator (statistical overall range) is 0.87%.

Although the districts do not comply precisely with the ideal population per district, mathematical exactness is not a requirement in state apportionment plans. *Reynolds*, 377 U.S. at 577 ("[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable."). In the plan at issue here, the deviations from ideal population are minimal. *See Brown v. Thomson*, 462 U.S. 835, 842 (1983) (as a general matter, apportionment plans with a maximum population deviation under 10% fall within the category of minor deviations); *Connor v. Finch*, 431 U.S. 407, 418 (1977). We find that the legislature has made a good-faith effort to achieve mathematical preciseness in the districts and has complied with the equal protection requirements of both the Florida and United States Constitutions.

We next address the Florida Constitution's requirement that legislative districts be "either contiguous, overlapping or identical territory." Art. III, § 16(a), Fla. Const. This Court has defined "contiguous" as " 'being in actual contact: touching along a boundary or at a point.' " *In re Apportionment Law, Senate Joint Resolution 1 E*, 414 So. 2d 1040, 1051 (Fla. 1982) (quoting *Webster's New Collegiate Dictionary* 245 (1973)). A district lacks contiguity "when a part is isolated from the rest by the territory of another district" or when the lands "mutually touch only at a common corner or right angle." *Id.*

Several parties challenge the contiguity of four Senate districts—districts 1, 8, 18, and 24. These parties assert that it is impossible to travel throughout these districts without crossing into another district. This impossibility of travel is not strictly a result of the configuration of the districts, however, but rather a result of the lack of roads in some areas or the presence of bodies of water without connecting bridges.

Although a contiguous district has been defined as one in which a person can go from any point within the district to any other point without leaving the district, such a definition does not impose a requirement of a paved, dry road connecting all parts of a district. Contiguity does not require convenience and ease of travel, or travel by terrestrial rather than marine forms of transportation. As the court noted in *Mader v. Crowell*, contiguity " 'does not mean in contact by land. Certainly, so far as . . . islands are concerned, they may be considered contiguous, although separated by wide reaches of navigable deep waters.' " 498 F. Supp. 226, 229 (M.D. Tenn. 1980) (emphasis deleted) (quoting *Board of Supervisors v. Blacker*, 52 N.W. 951, 953 (Mich. 1892)). Indeed, given the number of islands included within the territory of Florida, declaring that a district lacks contiguity when water separates its parts would invalidate any reapportionment plan that does not make an unconnected island a district in and of itself.

We hold, therefore, that the presence in a district of a body of water without a connecting bridge, even if it necessitates land travel outside the district in order to reach other parts of the district, does not violate this Court's standard for determining contiguity under the Florida Constitution. From our examination of the instant record, including detailed maps, we find that the districts as apportioned in the Joint Resolution satisfy the geographic requirements of the Florida Constitution.

The most contested issue before us is whether the Joint Resolution discriminates against any racial or language minority by minimizing its voting strength. The parties disagree with the standard by which we should address this issue. In order to explain their arguments, a brief historical discussion is required.

Congress enacted the Voting Rights Act of 1965 pursuant to authority granted by the Fifteenth Amendment to the United States Constitution. Section 2 of the Act provided that "[n]o voting qualifications or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973 (Supp. III 1965-1967). Section 5 of the Act prohibited any changes in voting procedures in certain designated areas of the country wherein discrimination had been most flagrant without first obtaining preclearance from the United States Attorney General or a declaratory judgment from the United States District Court for the District of Columbia. 42 U.S.C. § 1973c. The Voting Rights Act was later enlarged to cover language minorities, including Hispanics. 42 U.S.C. § 1973b(f) (1976).

From 1965 to 1980, those challenging apportionment plans under the Voting Rights Act were not required to prove deliberate discrimination in order to succeed. However, in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), a plurality of the United States Supreme Court held that

under the Voting Rights Act it was necessary for the plaintiffs to prove that the disputed plan was conceived as or operated as a purposeful device to further racial discrimination. In essence, *Bolden* required proof of what was in the minds of the legislators who enacted or retained the voting law alleged to be discriminatory.

In 1982, Congress reacted to *Bolden* by amending section 2 of the Voting Rights Act to eliminate the requirement of proving legislative intent to discriminate in order to establish a voting-rights claim. Pub. L. No. 97-205, 96 Stat. 131, 134 (1982). Under the amendment, section 2 was violated where the totality of circumstances revealed that "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (1982). The extent to which members of a protected class had been elected to office was deemed to be a circumstance which may be considered. At the same time, however, Congress also provided that nothing in section 2 established a right to have members of a protected class elected in numbers equal to their proportion in population. The effect of the 1982 amendment was to substitute a "results" test for the "intent" test required by *Bolden*.

The 1982 amendment to the Voting Rights Act was considered by the United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), a case involving a section 2 challenge to certain multimember districts in North Carolina. The Court held that plaintiffs challenging a redistricting plan must prove at least the following threshold conditions: (1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that the minority group is politically cohesive; and (3) that in the absence of special circumstances, bloc voting by the white

majority usually defeats the minority's preferred candidate.[3] *Id.* at 50-51. If these threshold requirements have been proven, certain objective factors must then be considered by the court in determining whether, from "the totality of the circumstances," a section 2 violation has been shown. These totality factors, which were derived from the Senate Judiciary Committee majority report that accompanied the 1982 amendment to section 2, include the following: (1) the extent of the history of official voting-related discrimination; (2) the extent of racially polarized voting; (3) the extent to which the state or political subdivision has used unusually large election districts, majority-vote requirements, anti-single-shot provisions, or other voting practices that tend to enhance the opportunity for discrimination; (4) the denial of minority

[3] A memorandum on Reapportionment Issues filed in this Court by Jon Mills of the Center for Governmental Responsibility at the University of Florida explains:

> In the case of demonstrating ethnically or racially polarized voting, the part of the "totality of circumstances" test where the courts have insisted on the most rigorous analysis, at least two sets of statistical tests must be run:
>
> a. Homogeneous or extreme case analysis of voting patterns, and
>
> b. Ecological regression analysis of voting patterns.
>
> The reason these two tests must be simultaneously run is that from a statistical standpoint, inference from one about the voting patterns of a district/county, or any segment of it, will be subject to the ecological fallacy, a fatal error in interpreting statistical tests. The "ecological fallacy" means that inferences about voting behavior of a large group (either majority or minority), based on a small sample of homogeneous precincts, are potentially specious. Similarly, inferences about the voting behavior of segments of the population based on area-wide analysis are equally fallacious. Simply put, the secret ballot protects the individual voter, as well as making simplistic conclusions about voting patterns impossible. Therefore, both sets of tests must be run concurrently and simultaneously, and the results of both evaluated before appropriate inferences about polarized and/or block voting can be inferred.

access to the candidate-slating process; (5) the extent to which members of the minority group bear the effects of discrimination in areas such as education, employment, and health, which hinder effective participation in the political process; (6) whether political campaigns have been characterized by racial appeals; (7) the extent to which members of the protected class have been elected to public office; (8) whether there is a significant lack of responsiveness by elected officials to the particularized needs of the minority group; and (9) whether the policy underlying the use of the voting qualification, standard, practice, or procedure is tenuous. *Id.* at 44-45.

In this Court's review of the 1982 legislative reapportionment, we addressed minority challenges to certain districts. *In re Apportionment Law, Senate Joint Resolution 1 E.* At that time, we stated that the sole question to be considered in the apportionment process was "the facial constitutional validity" of the apportionment plan. 414 So. 2d at 1052. Because this was before the 1982 amendment to the Voting Rights Act, we cited *City of Mobile v. Bolden* for the proposition that it was necessary for the minority challenger to prove invidious discrimination by evidence which showed that the plan was motivated by an intent to discriminate. Finding no evidence in the record of purposeful discrimination, we upheld the plan against the minority challenge.

Referring to our opinion in *In re Apportionment Law, Senate Joint Resolution 1 E*, the proponents of the Joint Resolution suggest that claims under the federal Voting Rights Act are not facial constitutional claims and need not be considered in this proceeding. Alternatively, they argue that in light of the Florida Constitution's requirement of a ruling on the validity of the Joint Resolution within 30 days, this Court cannot go beyond a facial evaluation of the resolution. Given the complex evidentiary standard imposed on those who challenge a redistricting

plan under the Voting Rights Act,[4] the proponents argue that this Court cannot possibly consider such a claim at this time.

The opponents of the plan assert that we cannot fulfill our duty to determine whether the Joint Resolution complies with the federal constitution without finding that the plan meets the standards of the Voting Rights Act, which was passed to implement the federal constitution. They also argue that in view of the Supremacy Clause of the United States Constitution, we cannot constitutionally determine that the Joint Resolution complies with the federal constitution if it violates a federal statute. *See Howlett ex rel. Howlett v. Rose*, 110 S. Ct. 2430, 2438 (1990) ("Federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature."). The several opponents suggest different methods by which we should resolve the matter, such as: (1) declaring the Joint Resolution facially invalid; (2) disregarding the 30-day requirement of article III, section 16(c) of the Florida Constitution, and referring the case to a judge to conduct the fact-finding analysis contemplated by the Voting Rights Act; or (3) withholding ruling and deferring to the pending federal court action on the subject.[5]

We cannot accept the narrow view that we should completely ignore the effect of the Voting Rights Act. Article III, section 16(c) requires us to determine "the validity of the apportionment." The Voting Rights Act obviously affects the validity of the Joint Resolution. Therefore, to the extent that we can do so under our own constitution,

[4] *See, e.g.*, Jeffers v. Clinton, 730 F. Supp. 196 (E.D. Ark. 1989) (conducting analysis of Voting Rights Act claims after hearing evidence for 12 days).

[5] DeGrandy v. Wetherell, No. TCA 92-40015-WS (N.D. Fla. filed Mar. 27, 1992).

we believe we are obligated to consider the Voting Rights Act in our evaluation of the validity of the plan. At the same time, it is impossible for us to conduct the complete factual analysis contemplated by the Voting Rights Act, as interpreted in *Thornburg v. Gingles*, within the time constraints of article III, section 16(c). However, our analysis will include a consideration of all of the statistical data filed herein, including the breakdown of white, black, and Hispanic voting-age populations and voting registrations[6] in the legislative districts contained in the Joint Resolution and in other proposed plans,[7] none of which are disputed. We shall be guided in our analysis by the law applicable to the Voting Rights Act. Any decision which requires consideration of facts that are unavailable in our analysis will have to be resolved in subsequent litigation, as explained later in this opinion.

In addressing the minority representation under the Joint Resolution, we begin by noting that the plan includes 13 black majority population House districts that are dispersed throughout the state where large and compact populations exist. These districts are number 8 (Gadsden and Leon), number 14 (Duval), number 15 (Duval), number 39 (Orange), number 55 (Hillsborough, Manatee, and Pinellas), number 59 (Hillsborough), number 84 (Palm Beach), number 93 (Broward), number 94 (Broward), number 103 (Dade), number 104 (Dade), number 108 (Dade), and number 109 (Dade). In addition, three so-called black influence districts[8] containing black popu-

[6] No voter registration statistics for Hispanics have been furnished.

[7] We have permitted all interested parties to file alternative apportionment plans in support of their arguments with respect to whether or not the Joint Resolution impermissibly discriminates against a minority group.

[8] Our use of the term influence districts refers to those in which the minority voting strength exceeds 25% but is less than 50%. The benefit to minorities in the creation of influence districts is sub-

lations from 29% to 33% are created: number 3 (Escambia), number 23 (Alachua and Marion), and number 118 (Dade).

Nine Hispanic majority population districts are created in the House. These districts are mainly in Dade County, since data reflects that the vast majority of the Hispanic population is geographically concentrated there. The Hispanic majority districts are number 102 (Collier and Dade), number 107 (Dade), number 110 (Dade), number 111 (Dade), number 112 (Dade), number 113 (Dade), number 114 (Dade), number 115 (Dade), and number 117 (Dade). Seven additional Hispanic influence districts are created: number 58 (Hillsborough), number 103 (Dade), number 106 (Dade), number 109 (Dade), number 116 (Dade), number 118 (Dade), and number 119 (Dade). The Hispanic population in these districts range from 26% to 46%.

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ject to debate. Some courts and commentators argue that by creating "super-minority" or influence districts the overall impact of the minority vote is actually diluted. Basically, according to this viewpoint, influence districts create a political apartheid, packing members of a minority into a single district in which, assuming racial bloc voting, they can never actually elect a candidate, since they are not a majority, and at the same time creating solid pockets surrounding the influence districts with no minority presence whatsoever, solidifying the power of the white majority. The counter-argument is that even without a voting majority, a district containing substantial voting strength can exert a meaningful influence on the outcome of elections and with the benefit of white crossover voting even elect minority candidates. The United States Supreme Court reserved ruling on the issue of the cognizability of a claim under the Voting Rights Act where the minority group seeks the creation of an influence district, rather than a majority district. Thornburg v. Gingles, 478 U.S. 30, 46 n.12 (1986). Federal courts are split on the issue of whether a section 2 claim can be brought where the minority is not sufficiently large and geographically compact to create an effective majority district. *Compare* Turner v. Arkansas, 784 F. Supp. 553, 564 (E.D. Ark. 1991) (no actionable claim for failure to create influence district), *petition for cert. filed* (U.S. Apr. 8, 1992) (No. 91-1615) *with* Armour v. Ohio, 775 F. Supp. 1044, 1050-52 (N.D. Ohio 1991) (holding such a claim to be actionable).

The Joint Resolution creates 2 black majority population Senate districts: number 30 (Broward and Dade) and number 36 (Dade). There are also 3 black influence districts: number 2 (Duval, Alachua, St. Johns, Clay, and Putnam), number 14 (Orange and Seminole), and number 3 (Bay, Calhoun, Franklin, Gadsden, Gulf, Jackson, Jefferson, Leon, Liberty, Madison and Wakulla). The black population in these districts range from 28% to 49%. Finally, there are 3 Hispanic majority population Senate districts: number 34 (Dade), number 37 (Dade), and number 39 (Dade).

Voting-age population statistics for these districts are also available. Black voting-age population is consistently lower than the total black population. The Hispanic voting-age population generally approximates the total Hispanic population. However, in some instances, it is slightly higher. Presumably, the voting-age population more accurately reflects current voting strength, although a current analysis based on total population could become increasingly reliable as people continue to reach voting age during the 10-year period before the next reapportionment.

The Joint Resolution provides for 11 House districts with a black voting-age population of 50.1% or higher and 2 black influence districts containing black voting-age populations of 46% and 46.9%, respectively. There are 9 House districts with a Hispanic voting-age population of 63.8% or higher, and 2 additional Hispanic influence districts containing voting-age populations of 38.4% and 46.4%, respectively.

Finally, the Joint Resolution includes 2 Senate districts with a black voting-age population of 51.7% or higher and 1 district with a black voting-age population of 45%. There are also 3 Senate districts with a Hispanic voting-age population of 64.3% or higher.

The proponents also allege that there was a substantial undercount of minorities in the 1990 census and, there-

fore, the figures contained in the data before us do not truly represent minority voting strength. The proponents point out that the United States Department of Commerce acknowledged a substantial undercount of both blacks and Hispanics. Florida is an intervenor in a suit to compel an adjustment for the undercount.[9] In a separate action, the House has obtained an order requiring the Department of Commerce to release the adjusted data. This order has been stayed pending appeal to the Eleventh Circuit Court of Appeals.[10]

We first address the issue of retrogression. Miguel DeGrandy, et al., argue that the black population and voting-age percentages have been reduced in certain Senate and House districts. However, in restructuring all of the district lines, there is bound to be some retrogression in minority voting strength in some districts. It is more appropriate to look at the overall plan to see whether or not it discriminates against minorities. The 1982 House plan contained only 7 House districts with a black population of 52% or higher and 7 districts with a Hispanic population of 58% or higher. In the Senate, the 1982 plan contained only 1 district with a black majority population and only 2 districts with a Hispanic population of 55% or higher. *See In re Apportionment Law, Senate Joint Resolution 1E.* The Joint Resolution provides for the possibility of appreciably greater statewide minority representation than under the 1982 plan. Hence, there has been no retrogression in that respect, and instead minority representation has been enhanced.

We next address the issue of the effectiveness of the minority districts created by the Joint Resolution. Gwen

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[9] City of New York v. United States Dep't of Commerce, No. 88-Civ-3474 (E.D.N.Y. filed July 23, 1991).

[10] Florida House of Representatives v. United States Dep't of Commerce, No. 91-40387-WS (N.D. Fla. Oct. 10, 1991), *appeal filed* (11th Cir. Jan. 10, 1992) (No. 92-2022).

Humphrey, et al., argue that many of the districts containing a black voting-age population of more than 50% are not as "safe" for black voters as those which could have been created. In 2 of the House districts the black voter registration is approximately 45%, and in 1 of the Senate districts the black voter registration is 46.4%. However, in the balance of the districts complained of, there is actually a higher percentage of black voter registration than there is of black voting-age population. Further, as Common Cause points out, there are several current districts where blacks comprise less than 50% of the population in the district, yet the district regularly elects black candidates.[11] On this record, we conclude that the districts which the Joint Resolution characterizes as black districts do provide blacks with an effective opportunity to elect representatives of their choice. While other plans create black majority districts with a higher percentage of black voters, this does not mean that the districts as created here are ineffective—only that districts could have been created that may have been more effective. Furthermore, there is always the risk that in creating a district where the minority population is so high as to be unnecessarily safe the minority influence will be siphoned off from other districts.

Several opponents of the plan attack the number of minority districts, contending that more could have been created. In the Senate, for example, a proposed plan submited by DeGrandy, et al., provides 3 more black influence districts than does the Joint Resolution and 1 more Hispanic majority district.[12] In the House, a proposed plan

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[11] Common Cause refers to one black representative who continues to be elected in a district with only a 27.33% black population.

[12] No Senate plan submitted by the opponents improves upon the number of black voting-age majority districts created by the Joint Resolution, although the majority districts created in some other plans do have greater voting-age majorities. In fact, the Common Cause plan creates only 1 black majority district, although it pro-

submitted by DeGrandy provides 2 more black majority districts, 4 more black influence districts, and 2 more Hispanic majority districts.

Notwithstanding, even the proposed alternate plan which contains the highest number of minority districts does not surpass by a large margin the number of minority districts created under the Joint Resolution. Furthermore, even the opponents cannot agree on what should have been accomplished. For example, several opponents contend that in Hillsborough County, rather than fragmenting the black community among 3 districts, as the Joint Resolution does, an additional black influence district should have been created. However, the NAACP stated at oral argument that it was not in favor of creating a strong black voting district in Hillsborough County because the black community there is not sufficiently compact and does not have sufficiently cohesive interests to create an effective influence district.

Some opponents accept most aspects of the Joint Resolution but contend that certain areas should have had an additional minority majority or influence district, or that some of the minority districts have a population which is insufficient to be truly effective, or that some districts have a minority population which is too high, resulting in dilution of the minority representation in surrounding districts. For example, the NAACP plan does not differ substantially from that created by the Joint Resolution. In the Senate the number of black majority districts and the number of black influence districts are the same under both plans. In the House both the NAACP and the Joint Resolution include the same number of black majority districts, but the NAACP plan creates 2 additional black

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vides for 2 additional black influence districts. It must be understood, that our use of the term majority district refers only to population or voting-age majorities. As noted by Common Cause, districts which do not contain minority population or voting-age majorities may in fact be safe minority districts.

influence districts. In fact, in considering just the area of Escambia County, plans submitted by the opponents ranged from splitting the county into 3 Senate districts, 1 of which has a black majority, to leaving the county intact in a single white majority district.

After carefully examining the briefs and alternative plans submitted by opponents of the Joint Resolution, we conclude that it may be that an additional Hispanic majority House district could have been created in Dade County. It may be that a stronger black influence Senate district could have been created in the Hillsborough County area and a stronger black House district could have been created in Escambia County. It may also be that the two House districts which contain a slight black majority voting-age population but only a 45% black registered voter population might have been strengthened. In fact, there may be a better plan. However, our job is not to select the best plan, but rather to decide whether the one adopted by the legislature is valid.

Given the limitations of our review, including both time constraints and the unavailability of specific factual findings, we conclude that the Joint Resolution does not discriminate against minorities. The plan is a material improvement over conditions under the 1982 plan, is not significantly less favorable to minorities than other proposed plans, and provides a substantial opportunity for minorities to influence elections and elect representatives of their choice.

Finally, several of the opponents observe that the Joint Resolution is nothing more than a gerrymandering effort by the Democratic majority of the legislature to protect Democratic incumbents.[13] We have little doubt that

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[13] Ironically, we have received letters from two Dade County Democratic representatives complaining that the Joint Resolution improperly dilutes the voting strengths of two compact and cohesive white areas in its effort to create more minority majority House districts.

politics played a large part in the adoption of this plan. However, the protection of incumbents, standing alone, is not illegal, *see Republican Party v. Wilder*, 774 F. Supp. 400 (W.D. Va. 1991), and none of the opponents seriously contend that the Joint Resolution is invalid because of political gerrymandering.[14]

Upon consideration, we conclude that Senate Joint Resolution 2G is valid and hereby approve it as the 1992 apportionment of the Florida legislature. We acknowledge that any interested person should have the opportunity to attempt to prove that the Joint Resolution is invalid through a presentation of evidence in accordance with the *Gingles* analysis of the Voting Rights Act. Therefore, our holding is without prejudice to the right of any protestor to question the validity of the plan by filing a petition in this Court alleging how the plan violates the Voting Rights Act. In such event, this Court will provide for an expedited disposition through the appointment of a commissioner to make findings of fact. *See Milton v. Smathers*, 351 So. 2d 24 (Fla. 1977). Thus, we retain exclusive state jurisdiction to consider any and all future proceedings relating to the validity of this apportionment plan. No motion for rehearing will be entertained.

It is so ordered.

McDONALD, BARKETT, KOGAN and HARDING, JJ., concur.

OVERTON, J., concurs with an opinion.

SHAW, C.J., dissents with an opinion.

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[14] We have also received complaints that certain smaller Florida cities have been unnecessarily divided in two by the Joint Resolution. While these are legitimate concerns, in most cases they appear to be an inevitable result of the legal requirements to draw district lins in such a manner as to provide significant minority voting strength. In any event, we cannot say that the legislature's determination to divide certain cities in the manner in which it did causes the Joint Resolution to be invalid.

OVERTON, J., concurring.

I concur in the majority opinion. In doing so, I suggest there is a more efficient and less expensive process to develop a reapportionment plan. The 1978 Constituton Revision Commission proposed an amendment to the constitution that would create an independent reapportionment commission. In that proposal, the members of the commission could not be elected officials, and the commission would be the only entity involved in developing a reapportionment plan. That constitutional proposal, although defeated with all the other constitution revision commission proposals in 1978, was uniformly considered noncontroversial and a major improvement in how a reapportionment plan should be developed for this state.

I suggest that the 1978 constitutional revision proposal be reexamined by the legislature for placement on the ballot at the next general election. The reapportionment commission proposal reads as follows:

> SECTION 16. Legislative and congressional reapportionment.—
>
> (a) REAPPORTIONMENT MANDATE. In each year ending in one, the state shall be divided into: as many congressional districts as there are United States Representatives apportioned to the state; not less than thirty or more than forty senate districts; and not less than eighty or more than one hundred and twenty representative districts. All legislative districts shall be single-member districts.
>
> (b) REAPPORTIONMENT COMMISSION. In each year ending in zero and at any other time of court-ordered reapportionment, a commission shall be established to prepare a reapportionment plan for congressional and state legislative districts. The commission shall consist of seven electors, none of whom may be elected public or party officers or employees of the state legislature. The president of the senate,

the speaker of the house of representatives, the minority leader of the senate, the minority leader of the house of representatives, and the chairperson of the political party which received the second highest vote in the last gubernatorial election shall each submit to the governor and make public a list of not less than three persons. By July 1 of the same year, the governor shall appoint one person from each list and one additional person. Within thirty days after the appointments have been made, the six commissioners shall select by a vote of at least four commissioners a seventh commissioner, who shall serve as chairperson. Failure to select the seventh commissioner within the time prescribed shall constitute an impasse which shall automatically discharge the commission. A new commission shall then be appointed in the same manner as the original commission. The legislature shall establish by law the qualifications of commissioners, the procedures for their selection and for the filing of vacancies, and the duties and powers of the commission. The legislature shall appropriate funds to enable the commission to carry out its duties.

(c) REAPPORTIONMENT STANDARDS.

(1) Congressional districts and state legislative districts for each respective house shall be as nearly equal in population as is practicable, based on the population reported in the federal census taken each year ending in zero. In no case shall a congressional district have a population which varies by more than one percent from the average population of all congressional districts in the state. In no case shall a single state legislative district have a population which carries by more than five percent from the average population of all districts of a house. In no case shall the average of the absolute values of the population deviations of all districts of the respective

house vary by more than two percent from the average population of all districts. Any population variance must be justifiable as necessary for compliance with one or more of the other standards set forth in this section. The commission shall have the burden of justifying any variance between the population of a district and the average population of all districts.

(2) Districts shall be composed of convenient contiguous territory and, consistent with subsection (1), shall be drawn to coincide with the boundaries of local political subdivisions.

(3) Districts shall be compact in form. The aggregate length of all district boundaries shall be as short as practicable consistent with the standards contained in subsections (1) and (2). In no case shall the aggregate length of the boundaries of all districts of a house, as well as of all districts within a local political subdivision that has a population sufficient to establish two or more districts, exceed by more than five percent the shortest possible aggregate length of all the districts under any other plan that is consistent with the other standards contained in this constitution.

(4) The commission shall prepare a plan that is equitable to all electors. In preparing a plan, the commission shall not use demographic information or information about incumbent legislators, the political affiliations of registered voters, or previous election results for the purpose of favoring any political party, incumbent legislator, or any other person or group.

(5) No district shall be drawn for the purpose of diluting the voting strength of any language or racial minority group.

(d) JUDICIAL REVIEW OF APPORTIONMENT. Within 15 days after the submission of an

apportionment plan by the commission, the Attorney General shall petition the supreme court of the state for a declaratory judgment determining the validity of the apportionment plan. The supreme court, in accordance with its rules, shall permit adversary interests to present their views, and, within 60 days from the filing of the petition, shall enter its judgment. Should the supreme court determine the apportionment plan to be invalid in whole or in part, the governor shall reconvene the commission which shall, within 30 days, adopt an apportionment plan conforming to the judgment of the supreme court. A revised plan shall be subject to judicial review by the supreme court in the same manner as the original plan.

Florida Constitution Revision Commission Proposed Revision to the Florida Constitution of 1968 art. III, § 16, Fla. Const. (Florida Constitution Revision Commission 1978) (on file in the Florida Legislative Library, The Capitol).

SHAW, C. J., dissenting.

I am unable to accept the majority's conclusion that the proposed plan passes muster under section 2 of the Voting Rights Act. I believe that Florida's longstanding and pervasive history of discrimination against minorities has combined with the presently existing districting plan to effectively deprive minority voters of an equal opportunity to elect representatives of their choice. Under the existing plan, an average of 11 blacks and 6 Hispanics have been elected to the 120-member state House at each election during the past ten years. During the same period, an average of 2 blacks and 1 Hispanic have been elected to the 40-member state Senate. The proposed plan offers little realistic hope for change.

I. BACKGROUND

Article III, section 16(c), Florida Constitution, provides the constitutional basis for the present proceeding:

> (c) JUDICIAL REVIEW OF APPORTIONMENT. Within fifteen days after the passage of the joint resolution of apportionment, the attorney general shall petition the supreme court of the state for a declaratory judgment determining the validity of the apportionment. The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment.

Art. III, § 16(c), Fla. Const.

I agree with the majority that this Court must consider section 2 of the Voting Rights Act in its present inquiry. Because this proceeding is an inquiry into the validity of a proposed plan rather than a challenge to an existing plan, however, *Thornburg v. Gingles*, 478 U.S. 30 (1986), while informative, is not dispositive. Since neither our state constitution nor federal precedent provides clear

guidance relative to this constitutional inquiry under the Voting Rights Act, I look to the Act itself for direction.

Section 2 of the Voting Rights Act was amended in 1982 to ban election practices that have a discriminatory effect, as well as those that have a discriminatory purpose. The amended Act reads as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) *A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.* The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1982) (some emphasis added).

The Senate Judiciary Committee majority report accompanying the bill of amendment sets out a nonexclusive list of factors ("Senate Report factors") that may typically be considered under the totality of the circumstances:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise participate in the domestic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision hear the effect of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in their jurisdiction.

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 206-07 (footnote omitted). The committee further provided:

> While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution [of minority votes]. The cases demonstrate, and the Committee intends that there is no requirement that any par-

ticular number of factors be proved, or that a majority of them point one way or the other.

Id. at 207. A section 2 inquiry as envisioned by Congress ordinarily embraces a "fact-intensive test" of the "past and present reality" within the jurisdiction. *Gingles*, 478 U.S. at 45-46.

II. FACIAL VALIDITY

Although this Court cannot in the present proceeding conduct the kind of fact-intensive analysis required in a direct challenge to an existing plan under the Voting Rights Act, I believe we have sufficient information before us to carry out our constitutional inquiry into the proposed plan's validity. We should first evaluate the presently existing legislative districting plan under the Act, using the Senate Report factors as a guide and taking into account both the historical information before this Court concerning statewide discrimination in election practices and statistical information concerning the opportunity of minorities under the existing plan to elect representatives of their choice. We should then compare the existing and proposed plans to determine if deficiencies in the existing plan have been corrected or simply repeated in a nonmeaningful reshuffling of districts. We should also appraise the realistic effectiveness of the proposed black and Hispanic majority districts in light of accepted criteria concerning the correlation between total minority population, voting-age population, registered voters, and voting patterns. Using these criteria, I find the proposed plan invalid—there is simply no reasonable basis to conclude that the plan would pass muster under a full, fact-intensive section 2 challenge.

Although I am aware of section 2's disclaimer that minorities have no right under the Act to be elected in numbers equal to their proportion of the general population, the Act does nevertheless compel us as a matter of common sense to consider the bottom-line figure of elected

minority representatives, so I cannot close my eyes to the fact that under the 1990 census, Florida's total population was 12,937,926, of which 1,759,533, or 14%, was black, and 1,573,318, or 12%, was Hispanic. "The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered." 42 U.S.C. § 1973(b) (1982). This criterion has been recognized by the federal Court as one (along with racial bloc voting) of the two most important Senate Report factors. *Gingles*, 478 U.S. at 48 n.15.

III. SENATE REPORT FACTORS

A. *History of Official Discrimination*

Florida has a longstanding general history of official discrimination against minorities that has influenced the electoral process. For example, our state constitution of 1885 provides:

> § 8. Poll tax
>
> Section 8. The Legislature shall have power to make the payment of the capitation tax, a prerequisite for voting, and all such taxes received shall go into the school fund.

Art. VI, § 8, Fla. Const. (1885), *reprinted in* 25 Fla. Stat. Ann. 568 (1970).

> § 12. White and colored; separate schools
>
> Section 12. White and colored children shall not be taught in the same school . . . .

Art. XII, § 12, Fla. Const. (1885), *reprinted in* 25 Fla. Stat. Ann. 617 (1970).

> § 24. Intermarriage of white persons and negroes prohibited
>
> Section 24. All marriages between a white person and a negro, or between a white person and a

> person of negro descent to the fourth generation, inclusive, are hereby forever prohibited.

Art. XVI, § 24, Fla. Const. (1885), *reprinted in* 25 Fla. Stat. Ann. 645 (1970). As recently as 1967, section 350.20, Florida Statutes, provided in part:

> The Florida public service commissioners may prescribe reasonable rules and regulations relating to the separation of white and colored passengers in passenger cars being operated in this state by any railroad company or other common carrier.

Section 1.01(6), Florida Statutes (1967), further stated in part:

> The words "negro," "colored," "colored persons," "mulatto" or "persons of color," when applied to persons, including every person having one-eighth or more of African or negro blood.

In addition to the state's record of general discrimination against minorities, federal precedent has addressed numerous recent discriminatory election practices in Florida, including at-large election schemes, white primaries, majority-vote requirements, and candidate filing fees. *See, e.g. Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 670 (1991); *Tallahassee Branch of NAACP v. Leon County*, 827 F.2d 1436 (11th Cir. 1987), *cert. denied*, 488 U.S. 960 (1988); *McMillan v. Escambia County*, 748 F.2d 1037 (5th Cir. 1984); *NAACP v. Gadsen County School Board*, 691 F.2d 978 (11th Cir. 1982); *James v. City of Sarasota*, 611 F. Supp. 25 (M.D. Fla. 1985). Because of this history of disfranchisement, it was not until 1964 that a majority of Florida's adult black citizens were registered to vote.

B. *Racially Polarized Voting*

"'[R]acial polarization' exists where there is 'a consistent relationship between [the] race of the voter and the way in which the voter votes,' or to put it differently,

where 'black voters and white voters vote differently.'" *Gingles*, 478 U.S. at 53 n.21 (citation omitted). The results of Florida's legislative elections over the past ten years establish the presence of this factor. Whites consistently elected whites when they constituted a majority within a district, and blacks elected blacks.

Redistricting following the 1980 census took place in Florida in 1982. During subsequent years, blacks and Hispanics were elected to the following state legislative seats (listed in number of seats and percentage of total House and Senate seats):

HOUSE (120 seats)

Year	Black seats	Hispanic seats
1982-84	10(8%)	3(2.5%)
1984-86	10(8%)	7(6%)
1986-88	11(9%)	7(6%)
1988-90	10(8%)	7(6%)
1990-92	12(10%)	7(6%)

SENATE (40 seats)

Year	Black seats	Hispanic seats
1982-84	2(5%)	0(0%)
1984-86	2(5%)	0(0%)
1986-88	2(5%)	0(0%)
1988-90	2(5%)	2(5%)
1990-92	2(5%)	3(7.5%)

During these years, only 5 blacks were elected to the state House from districts wherein blacks did not constitute a clear majority.[15] Two of these representatives[16]

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[15] Al Lawson, Jr., 1982-90, from District 9 (33% black under both 1980 and 1990 counts); Cynthia Chestnut, 1990, from District 23 (26% under 1980 census, and 27% under 1990 census); Tim Jamerson, 1982-90, from District 55 (49% and 56%); Bill Clark, 1982-90, from District 91 (45% and 60%); and Daryl Jones, 1990, from District 118 (26% and 29%).

[16] Tim Jamerson and Bill Clark.

came from districts[17] wherein blacks constituted a near majority under the 1980 census (49% and 45%) and clear majority under the 1990 census (56% and 60%). The remaining 3[18] came from districts[19] wherein blacks constituted a significant portion of the population under both the 1980 (33%, 26%, and 26%) and 1990 (33%, 27%, and 29%) counts. Of these 3 districts, only 1 elected a black representative more than once, and this was apparently an anomaly.[20] During this period, no Hispanic was elected to the House from a district wherein Hispanics did not constitute a clear majority.

During these same years, only 1 black was elected to the state Senate from a district wherein blacks did not constitute a clear majority.[21] This district contained a near majority of blacks under both the 1980 (49%) and 1990 (48%) counts. No Hispanic was elected to the Senate from a district wherein Hispanics did not constitute a clear majority.

Conversely, at each election during this period, in every district wherein blacks constituted a clear or near majority under either census, voters chose to be represented by a black legislator in the House.[22] The same is true of the Senate.[23] At each election subsequent to 1982, in every district wherein Hispanics constituted a clear majority,

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[17] Districts 55 and 91.

[18] Al Lawson, Jr., Cynthia Chestnut, and Daryl Jones.

[19] Districts 9, 23 and 118.

[20] District 9 elected Al Lawson, Jr., from 1982 to 1990.

[21] Arnett Girardeau, 1982-90, from District 7 (49% black under 1980 census, and 48% under 1990).

[22] Districts 16, 17, 40, 55, 63, 91, 106, 107, and 108 elected black representatives to the House at every election following the 1982 redistricting.

[23] Districts 7 and 36 elected black senators at every election following the 1982 redistricting.

voters chose to be represented by a Hispanic representative in the House.[24] The same is true of the Senate for elections held subsequent to 1988.[25]

C. *Election of Minority Officials*

Minorities have historically been underrepresented in Florida politics. Although significant portions of Florida's population traditionally have been black or Hispanic, blacks were unable to elect a single representative to the state House from 1889 to 1968. No black representative to the state Senate was elected from the time of Florida's inception until ten years ago, in 1982. No Hispanic state senator was elected until four years ago, in 1988. Florida has sent no black representative to Congress in over a century. Only 1 Hispanic congressperson serves from Florida.

IV. COMPARISON OF PRESENT AND PROPOSED PLANS

Proponents of the proposed plan argue that it differs from the existing plan by providing substantially greater opportunity for minorities to elect representatives of their choice. A comparison of the two plans, however, reveals no real change when the growth of minority populations over the past decade within existing districts as demonstrated by the 1990 census is considered.[26]

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[24] Districts 105, 109, 110, 111, 112, 113, and 115 have elected Hispanic representatives at every election from 1984 onward.

[25] Districts 33 and 40 elected Hispanic senators at every election from 1988 onward. District 34 elected a Hispanic senator at the 1990 election.

[26] The existing plan for House districts, in place since 1982, embraces 7 black majority districts under the 1980 census, 9 under the 1990 count, 12 black influence districts under the 1980 census, and 16 under the 1990 count. The plan includes 7 Hispanic majority House districts under the 1980 census, 7 under the 1990 count, 4 Hispanic influence districts under the 1980 census, and 8 under the 1990 count. As to the Senate, the existing plan embraces 1

In redrawing district lines for the House, the legislature has created 4 additional black majority districts, eliminated 13 black influence districts, created 2 additional Hispanic majority districts, and eliminated 1 Hispanic influence district. In redrawing Senate lines, the legislature has created 1 additional black majority district, retained the same number of black influence districts, eliminated 1 Hispanic majority district, and created 2 Hispanic influence districts. Thus, while the proposed plan offers change over the existing plan, it does little to increase the opportunity for minority representation, and in some instances actually decreases it. To the extent the plan benefits minorities, the changes are minor when compared to the historical underrepresentation and substantial inability miniorities in Florida have experienced in electing legislators of their choice throughout the past decade.

V. EFFECTIVENESS OF PROPOSED PLAN

In evaluating the effectiveness of the districting plans in fostering the opportunity of minorities to elect representatives of their choice, courts have recognized that minority concentrations substantially above 50% total population ("super-majorities") are often required because minority populations generally have more persons below voting age than do white populations. Also, voter registration and turnout among minorities oftentimes is decreased because of the lingering effects of past discrim-

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black majority district under the 1980 census, 1 under the 1990 count, 3 black influence districts under the 1980 census, and 4 under the 1990 count. The plan includes 2 Hispanic majority Senate districts under the 1980 census, 4 under the 1990 count, 2 Hispanic influence districts under the 1980 census, and none under the 1990 count.

The proposed plan for House districts embraces 13 black majority districts, 3 black influence districts, 9 Hispanic majority districts, and 7 Hispanic influence districts. The plan also includes 2 black majority Senate districts, 4 black influence districts, 3 Hispanic majority districts, and 2 Hispanic influence districts.

inatory practices that may have rendered registration and voting unduly burdensome or futile. *See* Kimball Brace et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 Law & Pol'y 43 (1988).

Taking these factors into account, the proposed plan is seriously flawed. While the plan for the House contains 13 black majority districts based on total population, only 11 of these contain black majority voting-age populations, and only 9 contain a majority of registered black voters.[27] As to the Senate, only 1 district contains a majority of registered black voters.

Even under the best-case scenario under the proposed plan, i.e., if blacks and Hispanics elected representatives of their choice in each of the proposed districts wherein they constituted a clear or poor majority board on total population (if blacks elected 13 representatives to the House and 3 senators, and Hispanics elected 9 representatives to the House and 3 senators), their representatives would still comprise only a fraction of the total these minorities make up of Florida's population. This is hardly a meaningful improvement over the existing apportionment plan.

VI. ALTERNATIVE PLANS

Numerous alternative plans were submitted to both the legislature and this Court showing that minorities are sufficiently large in numbers and geographically compact to constitute majority populations within additional districts that are reasonably configured and would give minorities significantly greater opportunity to elect representatives of their choice. For instance, alternative plan 292 provides for 15 House districts wherein blacks would constitute a majority of the total population (the proposed plan has 13). Both alternative plan 292 and the Reaves & Brown plan provide for 11 House districts

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[27] Unfortunately, voter registration information for Hispanics under the proposed plan was unavailable.

wherein Hispanics would constitute a majority of the total population (the proposed plan has 9). Most significant, the Reaves & Brown alternative plan provides for 6 black majority Senate districts (the proposed plan has 2), and several alternative plans (plan 275, and those submitted by Reaves & Brown, Kiser, and Common Cause) provide for 4 Hispanic majority Senate districts (the proposed plan has 3).

VII. CONCLUSION

In my opinion, opponents of the plan have successfully demonstrated that there is no reasonable basis to conclude that the plan would pass muster under a full, fact-intensive section 2 challenge. Opponents have adequately established the presence of a number of Senate Report factors and have shown the existing plan flawed. While the proposed plan offers change, it fails to significantly foster the opportunity for minorities to elect representatives of their choice. Any appearance of true positive change is illusory. Under the proposed plan, many minority citizens in Florida will be unable to elect representatives of their choice.

Based on the foregoing, I find the plan invalid.

Original Proceeding—Apportionment Law

Robert A. Butterworth, Attorney General; Richard E. Doran, Assistant Deputy Attorney General; Gerald B. Curington, Senior Assistant Attorney General and George L. Waas, Assistant Attorney General, Department of Legal Affairs, Tallahassee, Florida, on behalf of the Attorney General;

Stephen N. Zack, Norman C. Powell and Scott L. Warfman of Zack, Hanzman, Ponce & Tucker, Miami, Florida, on behalf of The Florida Senate;

Kevin X. Crowley and James A. Peters of Cobb, Cole & Bell, Tallahassee, Florida, on behalf of the Florida House of Representatives; and

Mark S. Levin, Tallahassee, Florida, on behalf of Simon Ferro, State Chairman, Florida Democratic Party,

Proponents

George N. Meros, Jr. of Rumberger, Kirk & Caldwell, Tallahassee, Florida, and E. Thom Rumberger and Daniel J. Gerber of Rumberger, Kirk & Caldwell, Orlando, Florida, on behalf of interested parties: Miguel DeGrandy, Andy Ireland, Van B. Poole, Republican Party of Florida, Luis Rojas, Javier Sauto, Alberto Cardenas, Luis Morse, Karen E. Butler, Jean Van Meter, Robert Woody, Mario Diaz-Balart, Casimer Smericki, Terry Ketchel, Rodolfo Garcia, Jr., Roberto Casas, Lincoln Diaz-Balart, Justo Luis Pozo, Rey Velazquez, Alberto Gutman, Sgt. Augusta Carter, Ana M. Pinnellas and Carlos Valdes;

Larry K. White, Tallahassee, Florida and Brenda White of Lawyers' Committee for Civil Rights Under Law, Washington, D.C., on behalf of interested parties: Gwen Humphrey, Vivian Kelly, Gerald Adams, Wilmateen W. Chandler, Dr. Percy L. Goodman, Jesse L. Nipper, Moease Smith, and Carolyn L. Williams;

Parker D. Thomson and Carol A. Licko of Thomson, Muraro & Razook, P.A., Miami, Florida, on behalf of Common Cause;

Charles G. Bull of Charles G. Bull, P.A., Tampa, Florida, Harry L. Lamb of Perry & Lamb, P.A., Orlando, Florida, and Dennis Courtland Hayes and Willie Abrams, NAACP Special Contribution Fund, Baltimore, Maryland, on behalf of the Florida State Conference of NAACP Branches;

Henry C. Hunter and Charles E. Vanture, Tallahassee, Florida, and Rodney G. Gregory of the Law Offices of Rodney G. Gregory, Jacksonville, Florida, on behalf of interested parties: Darryl Reaves, Corrine Brown and James Hargarett; and

Betty T. Ferguson, President of People's Positive Action Council (UP-PAC), Miami, Florida,

Opponents

APPENDIX F

ORDER LIST

THURSDAY, JULY 16, 1992

ORDER IN PENDING CASE

A-32

T. K. WETHERELL, SPEAKER OF THE FLORIDA HOUSE OF REPRESENTATIVES, *et al.*

v.

MIGUEL DE GRANDY, *et al.*

The application for stay presented to Justice Kennedy and by him referred to the Court is granted and it is ordered that the judgment of the United States District Court for the Northern District of Florida, filed July 2, 1992 in case Nos. 92-40015-WS, 92-40131-WS and 92-40220), is stayed pending the timely filing of a statement as to jurisdiction. Should such a statement be timely filed, this order is to remain in effect pending this Court's action on the appeal. In the event the judgment is affirmed, or the appeal is dismissed, this order is to terminate automatically. Should jurisdiction be noted or postponed, or should the judgment be summarily vacated or reversed, this order is to remain in effect pending the sending down of the judgment of this Court.

APPENDIX G

ORDER LIST

FRIDAY, JULY 17, 1992

ORDER IN PENDING CASE

A-51

T. K. WETHERELL, SPEAKER OF THE FLORIDA HOUSE OF REPRESENTATIVES, *et al.*

v.

MIGUEL DE GRANDY, *et al.*

The application for stay presented to Justice Kennedy and by him referred to the Court is granted and it is ordered that the order of the United States District Court for the Northern District of Florida, dated July 16, 1992 in case Nos. 92-40015-WS, 92-40220, is stayed pending the timely filing of a statement as to jurisdiction. Should such a statement be timely filed, this order is to remain in effect pending this Court's action on the appeal. In the event the judgment is affirmed, or the appeal is dismissed, this order is to terminate automatically. Should jurisdiction be noted or postponed, or should the judgment be summarily vacated or reversed, this order is to remain in effect pending the sending down of the judgment of this Court.

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No. 92-40015-WS

MIGUEL DE GRANDY, *et al.*,
Plaintiffs,

-vs-

T.K. WETHERELL, in his official capacity, *et al.*,
Defendants.

Case No. 92-40220-WS
(Consolidated)

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

STATE OF FLORIDA, *et al.*,
Defendants.

NOTICE OF APPEAL

[Filed Jul. 24, 1992]

Notice is hereby given that Defendants T. K. Wetherell and Peter Wallace, Defendants in the above-captioned action, hereby appeal to the United States Supreme Court from the Judgment of the three-judge District Court entered in this action on July 2, 1992.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

KEVIN X. CROWLEY
Fla. Bar #0253286

/s/ James A. Peters
JAMES A. PETERS
Fla. Bar #0230944

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Counsel for Defendants T.K. Wetherell
and Peter Wallace

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No. TCA 92-40015WS

MIGUEL DE GRANDY, *et al.*,
Plaintiffs,

and

GWEN HUMPHREY, *et al.*,
Intervenors,

-vs-

T.K. WETHERELL, in his official capacity, *et al.*,
Defendants.

Case No. TCA 92-40131-WS

FLORIDA STATE CONFERENCE OF NAACP
BRANCHES, *et al.*,
Plaintiffs,

-vs-

LAWTON CHILES, in his official capacity, *et al.*,
Defendants.

Case No. TCA 92-40220-WS

UNITED STATES OF AMERICA,
Plaintiffs,

-vs-

STATE OF FLORIDA, *et al.*,
Defendants.

NOTICE OF APPEAL

[Filed Jul. 29, 1992]

Defendants, Lawton Chiles, Jim Smith, Robert A. Butterworth, and the State of Florida, by and through under-

signed counsel, appeal to the Supreme Court of the United States the three-judge district court's judgment entered on July 2, 1992, granting an injunction with respect to the enforcement of Florida's state-wide reapportionment plan SJR 2G. This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

/s/ Richard E. Doran
RICHARD E. DORAN
Assistant Deputy Attorney General
Florida Bar No. 0325104

GERALD B. CURINGTON
Assistant Attorney General
Florida Bar No. 0224170

GEORGE L. WAAS
Assistant Attorney General
Florida Bar No. 0129967

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No. 92-40015-WS

MIGUEL DE GRANDY, *et al.*,
Plaintiffs,

-vs-

T.K. WETHERELL, in his official capacity, *et al.*,
Defendants.

Case No. 92-40220-WS
(Consolidated)

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

STATE OF FLORIDA, *et al.*,
Defendants.

HOUSE DEFENDANTS' EMERGENCY MOTION FOR RECONSIDERATION, REHEARING, RELIEF FROM ORDER

The House Defendants, pursuant to Rule 59 and Rule 60, Fed.R.Civ.P., move for rehearing, reconsideration, and relief from this Court's ore tenus remedial order of July 1, 1992 [1] For the reasons more fully stated below, this

[1] This Motion is without prejudice to jurisdictional and other arguments which may be asserted by these Defendants by appeal of the Court's finding of liability and remedy.

Court's Order requiring implementation of De Grandy House Plan 348 is premised on a misapprehension of the extent and ramifications of that plan on districts and counties and cities and citizens who should not otherwise be affected by the matters placed at issue before this Court. The Order represents an excessive exercise of the Court's remedial power. The House Defendants otherwise submit they are entitled to relief from the Remedial Order as that Order is premised on a misrepresentation to the Court as to the impact of the De Grandy plan on three of the most densely populated counties of this state.

MEMORANDUM OF LAW

This case, proceeding to hearing, finding of liability, and ore tenus remedial order has moved at a break neck speed. The matters adjudicated last night arose from a Complaint and Amended Complaint filed just last week. These Complaints were determined by this Court to be "at issue" on Noon on Friday, June 26, 1992, and the hearing commenced less than one-half hour thereafter. Varying protests of surprise were claimed throughout the hearing by even the Plaintiffs.[2] The extraordinary pace by which the liability phase of the case was alleged and adjudicated —6 days—is exceeded by the pace in which the remedy phase of the case was completed—3 hours. Indeed, the plan adopted by the Court and ordered for implementation evidences on its face that it was prepared (by Republican

[2] Plaintiffs even claimed surprise because of the House and Senate Defendants advancement of the citizenship issue in the context of the first *Gingles* prong "sufficiently large and geographically compact so as to constitute a majority in a single member district". This Court openly expressed its concern as to the appropriate legal determination of that fundamental issue in the midst of the hearing after being advised of the holding in *Romero v. City of Pomona*, 883 F.2d 1418 (9th Cir. 1989). ". . . only those individuals eligible to vote can be counted in determining whether a minority group can constitute a voting majority of a single-member district."

Party operatives) at 4:15 P.M. on the very day its implementation was ordered.

Minimal discussion and argument of the impact of the then proposed plan occurred over a two hour period and involved little more than select data attached to the plan and unsworn argument of Plaintiff De Grandy concerning his perspective of the "ripple" impact of the plan and his views of the community in which he is running for office. Testimony concerning an impact of the plan on other people and parts of the state, including the black, Jewish, and Anglo populations and constituents in Dade, Broward, Palm Beach, Collier, and Monroe counties was nil because there was no opportunity to evaluate the plan for these purposes. Even the presentation of the limited analysis the House staff could prepare in 1½ hours was curtailed just as the Broward overlay map was about to be displayed to the Court.

The House defendants urge that the genesis of this plan and this Court's implementation of it under these circumstances represents a gross departure from fundamental requirements of Federal law. This departure disserves the interests and rights of the vast majority of the communities and citizens in the Southeast corner of Florida.

As the Eleventh Circuit recognized in *Tallahassee Branch of NAACP v. Leon County, Florida*, 827 F.2d 1436 (11th Cir. 1987):

> . . . federal courts must defer to the judgment of a state legislative body in the area of reapportionment. Principles of federalism and common sense mandate deference to a plan which has been legislatively enacted. First, the elected representatives of the people understand the existing political system and the changes which would result from reapportionment. Rarely, if ever, will the federal district court have the benefit of such insight. Second, political compromise can produce a voting system tailored to the city,

> county, or state to be reapportioned. The district court, however, is required blindly to lay voting lines with mathematical exactness. Third, federalism is preserved when reapportionment is performed by a legislative body of the state. Reapportionment produces a fundamental change in state government and affects who will represent the people. Consequently, that determination is best left to the people rather than the federal judiciary.

This Court lacks that insight and should not be lured into fracturing the product of legitimate political compromises in the so-called "ripple area".

As recognized by the Fifth Circuit in *Marshall v. Edwards*, 582 F.2d 927, 934 (5th Cir. 1978) "The Supreme Court has put tight reins on judicial power to reapportion because of the judiciary's uneasy position in these cases. The least representative branch of the government must take care when it reforms the most representative branch". The admonition from the Fifth Circuit is rooted in more fundamental case law from the United States Supreme Court. That authority affirms that legislative reapportionment is a matter for legislative consideration and determination. *Reynolds v. Sims*, 377 U.S. 533 (1964).

Because Federal Courts, in contrast to the Legislature, have no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name, the Court must proceed into the political thicket of reapportionment with caution and objectivity.

> In the wake of a legislature's failure to constitutionally reconcile these conflicting state and federal goals, however, a Federal Court is left with the unwelcome obligation of performing in the Legislature's stead, while lacking the political authoritiveness that the Legislature can bring to the task. In such circumstances, the Court's task is inevitably an exposed

> and sensitive one that must be accomplished circumspectly in a matter free from any taint of arbitrariness or discrimination".

Roman v. Sincock, 377 U.S. 695, 710 (1973). *Connor v. Finch*, 431 U.S. 407, 414 (1976) (The courts must minimize friction between their remedies and legitimate state policies). *See also Upham v. Seamon*, 456 U.S. 37 (1982).

Under no circumstances can the scenario of the evening of July 1, 1992 be characterized as one of circumspection. Similarly, both the source of De Grandy plan # 348, the hurried subjective manner of its presentation by the Plaintiff, and the total absence of resources and objective measures for evaluation poison any arguable legitimacy of the plan.

Indeed, by contrast, even the hurried process in the remedies phase of the congressional part of this case last month evidences an improvement from last evening's summary evaluation of this eleventh hour fix. The House Defendants respectfully direct this Court to its own files and to the Court appointed Expert's and Special Master's explanations of the objectivity of their plan to appreciate the circumspection that is required.

As a final ground, Defendants seek relief from ordered implementation under the requirements of Rule 60(b)(3) based upon misrepresentation as to the "ripple" on areas other than the area of concentration of Hispanics in Dade County. Representations were that the "ripple" was minimal and that the plan's effect on Broward and Palm Beach counties was insignificant. Without benefit of even the meager demonstrative exhibits, overlays, and objective data which the House was able to muster during the 1½ hour period granted, this Court accepted those representations.

As more fully evidenced in the attached reports, the impact of the implementation of the De Grandy plan on the

districts and citizens and communities of interest in Dade, Broward, and Palm Beach, and other counties is profound.[3] The remedy affects not only the Hispanics' demand for two more districts in Dade—from 9 to 11—but fundamental communities of interest, county boundaries, city boundaries, and even the Democrat/Republican composite in the so-called "ripple area". The "ripple" is really a political tidal wave.

The true effect on black populations remains to be fully developed and argued and the NAACP last night expressed its concern accordingly. In some areas the plan should be characterized as a "judicialmander" by which this Court has entered, plowed, and unknowingly reseeded the "political thicket" for a November 1992 bumper crop of Republican victories.

As recognized in the June 19, 1992 three-judge decision from the United States District Court for the District of Arizona in *Arizonas for Fair Representation v. Symington*, Case No. 92-256-PHX-SMM

> Interim use of a plan is necessitated by the "proximity of a forthcoming election and the mechanics and complexities of the state's election laws." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964); *Terrazas v. Clements*, 537 F.Supp. 514, 537 (N.D. Texas 1982); *see also Upham v. Seamon*, 456 U.S. 37, 43 (1982) (recognizing that district courts have authority to order or to permit elections to be held that "do not in all respects measure up to the legal requirements, even constitutional requirements."). As the Supreme

[3] To this extent, the remedy violates the severability clause of SJR 2-G.

> If any provision of this joint resolution or the application thereof to any person or circumstances, or to any senatorial or representative district established in this joint resolution is held invalid, the invalidity shall not affect other provisions or applications of this joint resolution, or any other districts established in this joint resolution. . . .

> Court in *Upham* acknowledged: "Necessity has been the motivating factor in these situations."

Upham, 456 U.S. at 44. Like the situation in Arizona, necessity should here be the motivating factor because Florida's primary election, like that in Arizona, is during the first week of September. The state plan should be the interim plan.

CONCLUSION

The De Grandy court ordered plan, created and imposed at the eleventh hour with a total absence of objective review, unnecessarily and illegally traumatises the counties and citizens in Florida's Gold Coast, compromises and destroys the communities of interest and political coalitions the citizens of those areas, and further violates the review process required by controlling Supreme Court precedent. It is another surprise, but of more profound consequences.

Consistent with the policies articulated above and most recently recognized by the District Court in Arizona, this Court should amend its July 1, 1992 ore tenus Order by directing the implementation of SJR 2-G or by commencing appropriate procedures to insure that any plan of this Court is free of the arbitrariness, political bias, and surprise of the eleventh hour De Grandy cure.

Respectfully submitted,

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Fla. Bar. # 0253286

/s/ James A. Peters
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Fla. Bar # 0230944

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Counsel for House Defendants

AFFIDAVIT

STATE OF FLORIDA)
COUNTY OF LEON)

I, George H. Meier, the undersigned being first duly sworn upon oath, do hereby depose and state as follows:

1. I am employed by the Florida House of Representatives as Staff Director of the Committee on Reapportionment.

2. As Staff Director, I am proficient in the use of computers to draw legislative and congressional districting plans and to review and analyze plans. My responsibilities have included reviewing redistricting plans prepared on other computer systems and imported into the Committee's computer system.

3. I have had the opportunity to examine and compare DeGrandy Plan 292 (See Attachment A), hereinafter referred P 292, submitted to this Court by the plaintiffs and the modified DeGrandy Plan (See Attchment B), hereinafter referred to as M 292, presented to this court on the evening of July 1, 1992. Neither DeGrandy Plan was ever introduced into the legislative process, therefore the legislature was never presented with the opportunity to consider these plans.

4. My comparison of P 292 and M 292 indicates that they are significantly different plans. The modified plan is not simply P 292 with some minor modifications to incorporate the DeGrandy Plan into the Florida Plan. It is a completely new plan. Not a single district has remained intact between P 292 and M 292.

3. The M 292 Plan alters the boundaries of 31 districts in the Florida Plan (over 25 percent of the districts in the Florida House of Representatives). These changes extend far beyond Dade County: Monroe, Collier, Broward, and Palm Beach Counties are all effected by the modifications. It is not necessary to alter the districts in

Collier, Monroe and Palm Beach and two-thirds of Broward County to incorporate the Dade County minority districts in the original DeGrandy Plan into the Florida Plan. Two of the counties in which districts have been altered by M 292 are counties covered under Section 5 of the Voting Rights Act. These districts in Collier and Monroe counties had previously been reviewed by the Department of Justice and approved for implementation.

4. It is possible to create eleven majority Hispanic voting age population districts and four majority African-American districts wholly within Dade County. Such a plan would have no effect on districts or counties in which no Section 2 violation was alleged or which are covered by Section 5 of the Voting Rights Act.

5. On July 1, 1992, at the direction of Rep. Peter Wallace, Chairman of the House Reapportionment Committee, my staff and I prepared a remedial plan which would contain eleven majority Hispanic districts and have minimal impact on any districts outside of Dade County. The plan was drawn to serve as a remedial plan if this court found a Section 2 violation in Dade County. The plan was completed after 3:00 p.m. on July 1, 1992. This was the first plan prepared by our committee that included eleven Hispanic districts since we believed that such a plan would not create a sufficient number of safe Hispanic districts.

FURTHER AFFIANT SAYETH NOT.

/s/ George M. Meier
GEORGE M. MEIER

Sworn to and subscribed before me, this 2nd day of July 1992.

/s/ Barbara A. Payne
Notary Public
My Commission Expires:
April 11, 1993

AFFIDAVIT

STATE OF FLORIDA)
COUNTY OF LEON)

I, Kimball W. Brace, the undersigned being first duly sworn upon oath, do hereby depose and state as follows:

1. I am President of Election Data Services, Inc., a political consulting firm located in Washington, D.C. which specializes in reapportionment, redistricting, the Census, and political analysis. EDS, Inc. has been contracted by the Florida House of Representatives's Reapportionment Committee for the past three years to collect and analyze political election returns for use in redistricting.

2. I have been asked by the Florida House to review the modified DeGrandy plan adopted by this court on July 1, 1992 to determine the partison impact of the plan. It is my view that the DeGrandy plan will have a significant partison impact. The plan unnecessary [sic] pairs numerous incumbents.

3. To determine the partison impact of the modified-DeGrandy plan, I have compiled a report that lists the incumbents that have been placed together in a district. (See Attachment A.) In addition, I reviewed election return data to determine the political leanings of the new districts.

4. The modified-DeGrandy plan places 19 incumbents into districts with fellow incumbents. Of these incumbents, 14 are Democrats. In my experiences in redistricting I have never reviewed a plan with so many incumbents paired in so few counties.

5. The plan creates eight sets of pairings, including three districts in which three incumbents have been placed in a single district. There is one district that includes three Democratic incumbents within a strongly Democratic seat (#101), another district that has two Democrats and one Republican but leans strongly Republican (#93), and a third district that includes two Republicans and a Democrat which leans Republican (#112).

6. There are three strongly Democratic districts that each combine two Democratic incumbents together (#96, 104, & 106). Two other districts place a Democrat and a Republican together (#92 & 115), but each of them are fairly strongly Republican.

7. The modified-DeGrandy plan creates eight open seats, however only four of them lean Democratic. The other four are strongly Republican.

8. There is one non-pairing situation where a Democratic incumbent (Rep. Graber in district #100) is placed in a seat that tilts Republican.

9. Specifically, in district #92, Democratic Rep. Rayson was placed in a district with Republican Rep. Hanson. The district leans strongly Republican, and its Republican performance was enhanced compared to the original DeGrandy plan 292 that was presented to this Court. In addition, the original DeGrandy 292 plan kept these two incumbents in separate districts.

10. District 93 contains the homes of Democratic Reps. Stafford and Mackenzie, along with that of Republican Rep. Sanderson. This seat is safely Republican and would in all probability lead to the defeat of both Democrats.

11. District 96 contains the pairing of two Democrats, Reps. Deutsch and Ostrau, in a safely Democratic seat.

12. District 97 is an open seat that shows only slight Democratic leanings. It could possibly be won by a Republican.

13. In total, it is my assessment that the imposition of the modified-DeGrandy plan could lead to the defeat of at least 7, and as many as 11, current Democratic incumbents.

FURTHER AFFIANT SAYETH NOT.

/s/ Kimball W. Brace
KIMBALL W. BRACE

Sworn to and subscribed before me, this 2nd day of July 1992.

/s/ Barbara A. Payne
Notary Public
My Commission Expires:
April 11, 1993

PLAN 348

District	Incumbents	VAP %NHB	VAP %HISP
90	Clark (D)	56.29%	7.26%
91	Open	55.50%	7.52%
92	Rayson (D), Hanson (R)	1.01%	6.21%
93	Stafford (D), Mackenzie (D), Sanderson (R)	1.64%	5.46%
94	Tobin (D)	2.63%	5.08%
95	Young (D)	5.31%	14.83%
96	Deutsch (D), Ostrau (D)	4.00%	5.98%
97	Open	2.19%	11.10%
98	Lippman (D)	6.86%	8.59%
99	Open	5.08%	8.30%
100	Graber (D)	2.64%	6.32%
101	Geller (D), Silver (D), Abrams (D)	3.69%	10.89%
102	Open	53.09%	15.01%
103	Logan (D)	56.73%	21.01%
104	Bloom (D), Friedman (D)	4.02%	29.59%
105	Gutman (R)	1.58%	71.62%
106	Reaves (D), Gordon (D)	54.86%	24.38%
107	Burke (D)	54.33%	15.24%
108	Open	9.69%	81.89%
109	Rojas (R)	8.50%	63.74%
110	Garcia (R)	2.28%	62.56%
111	Morse (R)	6.87%	66.19%
112	Guber (D), Diaz-Balart (R), Valdes (R)	2.08%	65.10%
113	Hoffman (R)	7.92%	66.06%
114	Open	1.51%	66.39%
115	DeGrandy (R), Simon (D)	2.24%	68.52%
116	Open	3.24%	65.83%
117	Open	5.19%	66.24%
118	D. Jones (D)	39.01%	27.42%
119	Cosgrove (D)	6.12%	23.34%
120*	Saunders (D)	4.80%	13.90%

APPENDIX K

DECLARATION OF ALLAN J. LICHTMAN

I, Allan J. Lichtman, state the following:

1. I have previously submitted a declaration and testified in this case. I have been asked by the U.S. Department of Justice to analyze new information presented by the state on a) turnout data that may affect opportunities for Hispanics to elect candidates of their choice in various Hispanic districts in Dade County and b) estimates of the Hispanic citizen voting age population in these districts.

2. With respect to opportunities for Hispanic voters in Dade County districts, defendants have presented an analysis purporting to show district-specific turnout rates for State Senate districts. The state's data, taken from statewide general elections, may not accurately reflect turnout in Hispanic v. non-Hispanic state legislative elections. However, taking the state's estimates at face value, when combined with typical Hispanic cohesion and white crossover rates,[1] they show that Hispanics would have a realistic potential to elect legislative candidates of their choice in all 4 districts within the Reaves/Brown/Hargrett plan as well as all 3 districts within the state's plan. It is important to match the general election turnout presented by defendants with general election measures of Hispanic cohesion and non-Hispanic crossover.

[1] To keep the projections for the Hispanic candidates of choice conservative, I eliminated from the mean crossover rate the one election in which a majority of whites (62.6) voted for the Hispanic candidate of choice. Inclusion of this election would have raised the crossover rate from 28.5 percent to 32.3 percent and increased the projection of the vote for Hispanic candidates. Given the lack of significant black proportions in Hispanic districts and the lack of complete measurements in the state's data for black voting, the analysis for this declaration relies on estimates of white votes for the Hispanic candidate of choice (in every instance, the Hispanic candidate).

Measures of cohesion and crossover will be excerpted from Table 1 of my original declaration (that included both general elections and Republican primaries). The methodology used to project votes for candidates of choice of Hispanics is identical to the methodology I utilized as expert for the Department of Justice in *Garza v. Los Angeles County*. Results for the State's plan and the Reaves/Brown/Hargrett Plan are presented in Table 1 of this declaration.

3. The results reported in Table 1 corroborate the analysis presented in the earlier declaration. The projected vote for the Hispanic candidate of choice is at least several percentage points above 50 percent in all three districts in the state's plan and in three districts in the Reaves/Brown/Hargrett plan. In an additional district in the Reaves/Brown/Hargrett plan the projected vote for the Hispanic candidate of choice is just above 50 percent for the 1988 turnout and just below 50 percent for the 1990 turnout. Thus, compared to the state's plan there is one additional district in the Reaves/Brown/Hargrett which provides Hispanics a realistic potential to elect candidates of their choice.

4. I have also been asked to examine estimates presented by experts for the defendants on the percentage of citizen voting-age Hispanics in districts within the state's plan and the Reaves/Brown/Hargrett plan. These estimates are based on a regression analysis of the percentage of voting age citizens in block groups within Dade County and the corresponding percentages of Hispanics and of Cubans. The results of this analysis are not sufficiently reliable, however, to draw conclusions about the Hispanic citizenship percentage of any district within Dade County. The results appear to understate substantially the Hispanic citizenship percentage of Dade County districts.

5. The analysis presented in Table 2 uses the actual number of citizens in Dade County, supplied to me by the Department of Justice from the 1990 Census. As this

analysis demonstrates, estimates presented by experts for defendants understate by more than 80,000 persons the number of voting age citizens in Dade County. A prorated estimate of the number of missed Hispanic citizens equals 65,878. The addition of these missed Hispanic citizens increases the estimated Hispanic citizenship rate by nearly one-quarter, from 38.1% to 47.0%. The influence of the missed Hispanic citizens on Cuban versus non-Cuban Hispanic citizenship rates cannot be determined.

6. One source of the unreliability of the analysis presented by experts for defendants is a highly questionable means of performing the ecological regression analysis used to estimate citizenship rates. One hallmark of ecological regression analysis is that both the "dependent variable" and the "independent variable" be measured on a common base: that is the percentages have the same denominator.[2] In this case, the dependent variable, the percentage of citizens in a Census bloc is measured as a percentage of voting age population. This means that the independent variables should be likewise be measured as percentages of voting age population. The proper procedure for estimating the percentage of non-Cuban and Cuban Hispanics who are citizens would be to regress the percentage of the voting-age population who were citizens in each census block on the percentage of non-Cuban Hispanics among voting age persons in each block and the percentage of Cuban Hispanics among voting age persons in each block. In this way the Hispanic population is separated without overlap in the equation. As indicated in Attachment 1, however, the citizenship analysis presented to this court includes as its independent variables, "% Hispanic of persons" and "% Cuban of His-

[2] "Ecological regression requires that the ratios which comprise independent and dependent variables use the same denominator; 'ordinary' regression does not." James W. Loewen and Bernard Grofman, "Recent Developments in Methods Used in Vote Dilution Litigation," *The Urban Lawyer* 21 (1989), p. 592-93.

panic persons." The two independent variables in this analysis do not have common denominators. The % Hispanic of persons is measured as a percentage of the voting age population, but % Cuban of Hispanic persons is measured as a percentage of the Hispanic voting-age population. Thus the analysis does not cleanly separate the Hispanic voting age population and could produce erroneous estimates of citizenship rates. Without the opportunity to examine results of an analysis presented in standard form I would have serious questions about the reliability of the analysis performed by defendants' experts.

7. Table 3 applies the re-estimated Hispanic citizenship rate of 47.0 percent to districts within the state's plan and the Reaves/Brown/Hargrett plan. This is only a rough estimate of the percent of Hispanic voting age citizens in each district, but it does show results quite different from those presented by expert for defendants. In two of three districts in the state's plan, the estimated percentage of Hispanics among citizens is above 50 percent; in one district the estimated percentage is just below 50 percent. In three of four districts in the R/B/H plan, the estimated percentage of Hispanics among citizens is above 50 percent; in one district the estimated percentage is just below 50 percent.

Pursuant to 28 U.S.C. 1746, I declare, under penalty of perjury, that the foregoing is true and correct.

/s/ Allan J. Lichtman
ALLAN J. LICHTMAN
6/30/92

TABLE 1

PROJECTED VOTE FOR CANDIDATE OF CHOICE OF HISPANICS GENERAL ELECTIONS, TURNOUT ESTIMATES PRESENTED BY DEFENDANTS COHESION AND CROSSOVER DATA FROM 10 GENERAL ELECTIONS 1986-1990, HISPANIC V. NON-HISPANIC CONTESTS *

Hispanic Cohesion Rate=87.2% Non-Hisp. Crossover Rate=28.5

STATE PLAN

I. State Plan: District 39

1988: Percent Hispanic Voters=59.6%
1990: Percent Hispanic Voters=54.3%

1. 1988 Hisp Vote For Hisp Cand Of Choice= .872 * 59.6%=52.0%
2. 1988 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 40.4%=11.5%
3. 1988 Total Vote For Hisp Cand Of Choice= 52.0% + 11.5%=63.5%

1 1990 Hisp Vote For Hisp Cand Of Choice= .872 * 54.3%=47.3%
2. 1990 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 45.7%=13.0%
3. 1990 Total Vote For Hisp Cand Of Choice= 47.3% + 13.0%=60.3%

II. State Plan: District 37

1988: Percent Hispanic Voters=49.2%
1990: Percent Hispanic Voters=46.6%

1. 1988 Hisp Vote For Hisp Cand Of Choice= .872 * 49.2%=42.9%
2. 1988 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 50.8%=14.5%
3. 1988 Total Vote For Hisp Cand Of Choice= 42.9% + 14.5%=57.4%

1. 1990 Hisp Vote For Hisp Cand Of Choice= .872 * 46.6%=40.6%
2. 1990 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 53.4%=15.2%
3. 1990 Total Vote For Hisp Cand Of Choice= 40.6% + 15.2%=55.8%

TABLE 1: CONTINUED

Hispanic Cohesion Rate=87.2% Non-Hisp. Crossover Rate=28.5

III. State Plan: District 34

1988: Percent Hispanic Voters=44.1%
1990: Percent Hispanic Voters=41.7%

1. 1988 Hisp Vote For Hisp Cand Of Choice= .872 * 44.1%=38.5%
2. 1988 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 55.9%=15.9%
3. 1988 Total Vote For Hisp Cand Of Choice= 38.5% + 15.9%=54.4%

1. 1990 Hisp Vote For Hisp Cand Of Choice= .872 * 41.7%=36.4%
2. 1990 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 53.4%=16.6%
3. 1990 Total Vote For Hisp Cand Of Choice= 36.4% + 16.6%=53.0%

REAVES/BROWN/HARGRETT PLAN

I. R/B/H Plan: District 34

1988: Percent Hispanic Voters=52.9%
1990: Percent Hispanic Voters=50.4%

1. 1988 Hisp Vote For Hisp Cand Of Choice= .872 * 52.9%=46.1%
2. 1988 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 47.1%=13.4%
3. 1988 Total Vote For Hisp Cand Of Choice= 46.1% + 13.4%=59.5%

1. 1990 Hisp Vote For Hisp Cand Of Choice= .872 * 50.4%=43.9%
2. 1990 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 49.6%=14.1%
3. 1990 Total Vote For Hisp Cand Of Choice= 43.9% + 14.1%=58.0%

II. R/B/H Plan: District 33

1988: Percent Hispanic Voters=47.3%
1990: Percent Hispanic Voters=43.1%

1. 1988 Hisp Vote For Hisp Cand Of Choice= .872 * 47.3%=41.2%

2. 1988 Non-Hisp Vote For Hisp Cand Of Choice = .285 * 52.9% = 15.1%
3. 1988 Total Vote For Hisp Cand Of Choice = 41.2% + 15.1% = 56.3%

1. 1990 Hisp Vote For Hisp Cand Of Choice = .872 * 43.1% = 37.6%
2. 1990 Non-Hisp Vote For Hisp Cand Of Choice = .285 * 56.9% = 16.2%
3. 1990 Total Vote For Hisp Cand Of Choice = 37.6% + 16.2% = 53.8%

III. R/B/H Plan: District 40

1988: Percent Hispanic Voters = 45.5%
1990: Percent Hispanic Voters = 42.9%

1. 1988 Hisp Vote For Hisp Cand Of Choice = .872 * 45.5% = 39.7%
2. 1988 Non-Hisp Vote For Hisp Cand Of Choice = .285 * 54.5% = 15.5%
3. 1988 Total Vote For Hisp Cand Of Choice = 39.7% + 15.5% = 55.2%

1. 1990 Hisp Vote For Hisp Cand Of Choice = .872 * 42.9% = 37.4%
2. 1990 Non-Hisp Vote For Hisp Cand Of Choice = .285 * 57.1% = 16.3%
3. 1990 Total Vote For Hisp Cand Of Choice = 37.4% + 16.3% = 53.7%

III. R/B/H Plan: District 35

1988: Percent Hispanic Voters = 37.8%
1990: Percent Hispanic Voters = 34.8%

1. 1988 Hisp Vote For Hisp Cand Of Choice = .872 * 37.8% = 33.0%
2. 1988 Non-Hisp Vote For Hisp Cand Of Choice = .285 * 62.2% = 17.7%
3. 1988 Total Vote For Hisp Cand Of Choice = 33.0% + 17.7% = 50.7%

1. 1990 Hisp Vote For Hisp Cand Of Choice = .872 * 34.8% = 30.3%
2. 1990 Non-Hisp Vote For Hisp Cand Of Choice = .285 * 65.2% = 18.6%
3. 1990 Total Vote For Hisp Cand Of Choice = 30.3% + 18.6% = 48.9%

TABLE 2

CITIZENSHIP ESTIMATES FOR DADE COUNTY PRESENTED BY EXPERTS FOR DEFENDANTS COMPARISON WITH ACTUAL NUMBERS OF CITIZENS IN DADE COUNTY

Estimated Voting-Age Citizenship Rate For Non-Hispanics: 85.8%
Estimated Voting-Age Citizenship Rate For Hispanics: 38.1%
Non-Hispanic Voting Age Population: 727,238
Hispanic Voting Age Population: 741,846

Estimated # Of Non-Hispanic Citizens = .858 * 727,238 = 623,970
Estimated # Of Non-Hispanic Non-Citizens = 727,238 − 623,970 = 103,268
Estimated # Of Hispanic Citizens = .381 * 741,846 = 282,643
Estimated # Of Non-Hispanic Non-Citizens = 741,846 − 282,643 = 459,203

Total Estimated # Of Citizens = 623,970 + 282,643 = 906,613

Actual # Of Citizens = 987,346

Number Of Citizens Underestimated = 906,613 − 987,346 = 80,733

Underestimates Prorated For Hispanics And Non-Hispanics:

1. Percent Of Hispanics Among Estimated Non-Citizens = 459,203/(103,268 + 459,203) = 81.6
2. Prorated # Of Missed Hispanic Citizens = .816 * 80,733 = 65,878
3. Reestimated Percentage Of Hispanic Citizenship Rate = (282,643 + 65,878)/741,846 = 47.0

TABLE 3

REESTIMATED PERCENTAGE OF HISPANIC VOTING AGE CITIZENS IN DISTRICTS
STATE PLAN, REAVES/BROWN/HARGRETT PLAN

STATE PLAN

I. STATE PLAN: District 39
Percent Hispanic Voting Age Population: 76.1
Percent Hispanic Citizen Voting Age Population =
(.761*.47)/(.761*.47 + .239*.858) = 63.6%

II. State Plan: District 34
Percent Hispanic Voting Age Population: 66.3
Percent Hispanic Citizen Voting Age Population =
(.663*.47)/(.663*.47 + .337*.858) = 51.9%

II. State Plan: District 37
Percent Hispanic Voting Age Population: 64.3
Percent Hispanic Citizen Voting Age Population =
(.643*.47)/(.643*.47 + .357*.858) = 49.7%

REAVES/BROWN/HARGRETT PLAN

I. R/B/H Plan: District 33
Percent Hispanic Voting Age Population: 66.8
Percent Hispanic Citizen Voting Age Population =
(.668*.47)/(.668*.47 + .332*.858) = 52.4%

II. R/B/H Plan: District 34
Percent Hispanic Voting Age Population: 65.0
Percent Hispanic Citizen Voting Age Population =
(.650*.47)/(.650*.47 + .350*.858) = 50.4%

III. R/B/H Plan: District 35
Percent Hispanic Voting Age Population: 65.7
Percent Hispanic Citizen Voting Age Population =
(.657*.47)/(.657*.47 + .343*.858) = 51.2%

IV. R/B/H Plan: District 40
Percent Hispanic Voting Age Population: 62.1
Percent Hispanic Citizen Voting Age Population =
(.621*.47)/(.621*.47 + .379*.858) = 47.3%

ATTACHMENT 1

Methodology for determining percentage of voting-age population who are citizens in Dade County, Florida.

Using 1990 census data, the group percentage of voting-age population who were citizens in each census block was regressed on the percentage of persons who were Hispanic and the percentage of Hispanic persons who were Cuban. The regression analysis yielded the following:

% of VAP who are citizens

= .858 − .602 (% Hispanic of persons) + .211 (% Cuban of Hispanic persons)
R^2 = .62

Illustrations of the Practical meaning. . . .

Block group composition	% of VAP who are citizens
100% nonhispanic	85.8%
0% Cuban, 100% Hispanic	25.6%
100% Cuban	46.7%
59.3% Cuban, 100% Hispanic	38.1%

(59.3% of Hispanic persons in Dade County are Cuban)

APPENDIX L

FLORIDA SUPREME COURT BRIEF EXCERPTS

1. "This Court cannot fulfil its duty to determine that the Joint Resolution complies with the Federal Constitution unless it first finds that the plan meets the standards of the Voting Rights Act. Like few other statutes, the Voting Rights Act is fundamental extension of the fourteenth and fifteenth amendment right of all citizens to vote. Further, in view of the Supremacy Clause, this Court cannot constitutionally determine that a state plan complies with the Federal Constitution if, in fact, that plan violates a federal statute. Howlett v. Rose, 110 S.Ct., 2430, 2438 (1990) ("Federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature"). Accordingly, because the Federal Constitution bans racial discrimination in voting, and because the Voting Rights Act specifically implements a constitutional provision, this Court must determine whether the Joint Resolution of Apportionment complies with the Voting Rights Act."

Brief of Miguel DeGrandy, Et al. In Opposition To Constitutionality of Joint Resolution 2G (filed April 24, 1992 in Fla. S.Ct. No. 79,674) at 9-10.

2. "In the current redistricting cycle, decisions of the various courts that have been involved in preparing or evaluating redistricting plans have consistently held that a Section 2 analysis is constitutionally imperative. Terrazas v. Slagel, (W.D. Tex. No. A91CA425, December 24, 1991); Hastert v. State Board of Elections, 777 F.Supp. 634 (M.D.Ill. 1991) (three-judge panel); Wesch v. Hunt, —— F.Supp. ——, 1992 W.L. 45533 CIV91-0787 (S.D.Ala. March 9, 1992); Wilson v. Eu, No, S022835 (Cal. January 27, 1992; Fletcher v. Golder, —— F.2d. —— (1992 W.L. 51295) (8th Cir. March 1992).

Because of 1987 amendments to rules implementing Section of the Voting Rights Act, this Court, must, in actuality, conduct both a Section 2 and a Section 5 analysis of the Joint Resolution. In 1987, in response to the 1982 amendments to the Voting Rights Act and changes in decisional law, the Department of Justice amended its Section 5 regulations to add the "totality of circumstances" test embodied in Section 2 to the preclearance review process. *See* CFR § 51.55(b). The 1990 reapportionment process is the first post-census application by the Department of Justice of this new standard to Section 5 jurisdiction.

Accordingly, if the Joint Resolution were declared to be valid, it would undergo a Section 2 analysis in the Section 5 preclearance review process by the Department of Justice. This Court has no less of a responsibility to ensure the plan's compliance with the Federal Constitution than does the Department of Justice. It would be inefficient and demeaning to the dignity of this Court to accept Proponents' suggestions and perfunctorily declare valid the Joint Resolution, only to have that review nullified by the Department of Justice. Such an inefficient result can be avoided by this Court's full evaluation of the plans, based on evidentiary proceedings, under Section 2 of the Voting Rights Act."

Brief of Miguel DeGrandy, Et al. In Opposition To Constitutionality of Joint Resolution 2G (filed April 24, 1992 in Fla. S.Ct. No. 79,674) at 13-14.

3. "Proponents make the remarkable assertion that this Court need not make such an inquiry, essentially because it is just too hard. (See p. 17 of Proponents' Brief). The voters' rights to a constitutional redistricting plan cannot be so cavalierly dismissed. The United States Constitution requires this Court to conduct a full Section 2 analysis on the basis of full

evidentiary proceedings. To the extent that Article III, Section 16, and decisions of this Court construing that Section, do not permit such proceedings, the provision is unconstitutional as applied."

Brief of Miguel DeGrandy, Et al. In Opposition To Constitutionality of Joint Resolution 2G (filed April 24, 1992 in Fla. S. Ct. No. 79,674) at 15.

APPENDIX M

SJR 2-G

ADOPTED APRIL 10, 1992

REPRESENTATIVE DISTRICTS:

A PLAN OF APPORTIONMENT

FOR

THE FLORIDA HOUSE OF REPRESENTATIVES

Report Prepared by

COMMITTEE ON REAPPORTIONMENT
FLORIDA HOUSE OF REPRESENTATIVES

April 13, 1992

DB: FLORIDA

District Summary
1990 Voting Age Population (18+) by Race and Ethnicity
Plan: H0600 House (SJR 2-G) (SP268)

Plan type: Florida House

District Name	Total Pop	Total VAP	Non-Hisp White VAP	Non-Hisp Black VAP	Hispanic VAP	Tot. Black VAP
District 1	108,297 100.00%	78,076 72.09%	65,552 83.96%	10,126 12.97%	818 1.05%	10,175 13.03%
District 2	108,421 100.00%	81,417 75.09%	72,135 88.60%	4,867 5.98%	1,846 2.27%	4,952 6.08%
District 3	108,317 100.00%	81,305 75.06%	57,096 70.22%	21,055 25.90%	1,430 1.76%	21,151 26.01%
District 4	108,418 100.00%	82,499 76.09%	75,716 91.78%	2,745 3.33%	1,908 2.31%	2,787 3.38%
District 5	108,340 100.00%	79,113 73.02%	66,510 84.07%	8,934 11.29%	1,779 2.25%	9,023 11.41%
District 6	108,440 100.00%	81,212 74.89%	69,411 85.47%	8,566 10.55%	1,364 1.68%	8,623 10.62%
District 7	108,417 100.00%	81,139 74.84%	66,788 82.31%	12,081 14.89%	1,511 1.86%	12,222 15.06%
District 8	106,377 100.00%	81,289 76.42%	40,883 50.29%	37,206 45.77%	1,956 2.41%	37,401 46.01%
District 9	108,403 100.00%	83,409 76.94%	70,702 84.77%	9,258 11.10%	2,243 2.69%	9,362 11.22%

District 10	107,956 100.00%	79,996 74.10%	66,978 83.73%	11,529 14.41%	918 1.15%	11,572 14.47%
District 11	108,161 100.00%	78,525 72.60%	61,191 77.93%	15,442 19.67%	1,371 1.75%	15,550 19.80%
District 12	108,091 100.00%	78,835 72.93%	66,483 84.33%	10,585 13.43%	1,200 1.52%	10,721 13.60%
District 13	108,070 100.00%	77,798 71.99%	67,104 86.25%	5,734 7.37%	2,638 3.39%	5,850 7.52%
District 14	106,414 100.00%	76,692 72.07%	33,477 43.65%	41,168 53.68%	1,092 1.42%	41,412 54.00%
District 15	106,429 100.00%	77,176 72.51%	35,953 46.59%	39,260 50.87%	1,164 1.51%	39,511 51.20%
District 16	108,068 100.00%	83,682 77.43%	71,775 85.77%	8,422 10.06%	2,058 2.46%	8,525 10.19%
District 17	107,966 100.00%	79,632 73.76%	68,770 86.36%	6,159 7.73%	2,355 2.96%	6,251 7.85%
District 18	107,867 100.00%	84,788 78.60%	73,697 86.92%	6,657 7.85%	2,679 3.16%	6,780 8.00%
District 19	108,213 100.00%	77,187 71.33%	70,869 91.81%	2,857 3.70%	1,901 2.46%	2,909 3.77%
District 20	107,926 100.00%	85,390 79.12%	76,045 89.06%	6,434 7.53%	2,202 2.58%	6,563 7.69%
District 21	107,743 100.00%	79,835 74.10%	69,546 87.11%	8,369 10.48%	1,411 1.77%	8,415 10.54%
District 22	107,976 100.00%	81,301 75.30%	68,766 84.58%	7,980 9.82%	3,137 3.86%	8,062 9.92%

District Name	Total Pop	Total VAP	Non-Hisp White VAP	Non-Hisp Black VAP	Hispanic VAP	Tot. Black VAP
District 23	106,917	85,769	55,541	24,142	3,354	24,361
	100.00%	80.22%	64.76%	28.15%	3.91%	28.40%
District 24	107,404	84,583	77,168	4,398	2,292	4,518
	100.00%	78.75%	91.23%	5.20%	2.71%	5.34%
District 25	108,129	84,694	77,228	3,501	3,259	3,573
	100.00%	78.33%	91.18%	4.13%	3.85%	4.22%
District 26	107,825	83,790	72,027	6,529	4,511	6,667
	100.00%	77.71%	85.96%	7.79%	5.38%	7.96%
District 27	107,903	88,687	72,052	13,820	1,804	13,937
	100.00%	82.19%	81.24%	15.58%	2.03%	15.71%
District 28	107,824	88,295	84,102	2,185	1,343	2,213
	100.00%	81.89%	95.25%	2.47%	1.52%	2.51%
District 29	107,309	80,060	66,396	10,884	1,821	11,009
	100.00%	74.61%	82.93%	13.59%	2.27%	13.75%
District 30	108,151	87,885	82,573	1,700	2,342	1,766
	100.00%	81.26%	93.96%	1.93%	2.66%	2.01%
District 31	108,098	86,213	76,226	5,310	2,953	5,440
	100.00%	79.75%	88.42%	6.16%	3.43%	6.31%
District 32	108,304	80,941	71,601	3,306	4,674	3,432
	100.00%	74.74%	88.46%	4.08%	5.77%	4.24%
District 33	108,223	79,155	64,195	9,963	3,956	10,094
	100.00%	73.14%	81.10%	12.59%	5.00%	12.75%

District 34	108,087	81,315	71,374	3,033	5,377	3,147
	100.00%	75.23%	87.77%	3.73%	6.61%	3.87%
District 35	108,410	83,811	68,256	2,641	10,402	2,822
	100.00%	77.31%	81.44%	3.15%	12.41%	3.37%
District 36	108,401	90,577	77,668	3,931	7,389	4,131
	100.00%	83.56%	85.75%	4.34%	8.16%	4.56%
District 37	107,969	81,664	71,413	3,214	5,466	3,382
	100.00%	75.64%	87.45%	3.94%	6.69%	4.14%
District 38	108,258	78,781	57,750	14,521	5,239	14,833
	100.00%	72.77%	73.30%	18.43%	6.65%	18.83%
District 39	106,429	75,225	31,350	36,987	5,630	37,769
	100.00%	70.68%	41.67%	49.17%	7.48%	50.21%
District 40	108,253	85,242	70,805	2,986	9,032	3,251
	100.00%	78.74%	83.06%	3.50%	10.60%	3.81%
District 41	107,959	81,682	70,016	4,859	5,160	5,043
	100.00%	75.66%	85.72%	5.95%	6.32%	6.17%
District 42	108,325	87,026	78,015	6,937	1,591	7,240
	100.00%	80.34%	89.65%	7.97%	1.83%	8.32%
District 43	107,870	89,228	85,679	1,591	1,442	1,615
	100.00%	82.72%	96.02%	1.78%	1.62%	1.81%
District 44	107,820	85,986	79,406	3,403	2,629	3,487
	100.00%	79.75%	92.35%	3.96%	3.06%	4.06%
District 45	108,249	84,720	79,248	1,982	2,878	2,032
	100.00%	78.26%	93.54%	2.34%	3.40%	2.40%
District 46	108,305	94,112	91,588	291	1,702	320
	100.00%	86.90%	97.32%	0.31%	1.81%	0.34%

District Name	Total Pop	Total VAP	Non-Hisp White VAP	Non-Hisp Black VAP	Hispanic VAP	Tot. Black VAP
District 47	108,243	83,227	71,699	2,967	7,203	3,053
	100.00%	76.89%	86.15%	3.56%	8.65%	3.67%
District 48	107,904	86,035	82,165	1,010	2,072	1,045
	100.00%	79.73%	95.50%	1.17%	2.41%	1.21%
District 49	108,333	91,996	88,915	645	1,653	666
	100.00%	84.92%	96.65%	0.70%	1.80%	0.72%
District 50	108,300	89,671	80,819	5,422	2,354	5,501
	100.00%	82.80%	90.13%	6.05%	2.63%	6.13%
District 51	108,323	87,442	81,894	2,072	2,028	2,118
	100.00%	80.72%	93.66%	2.37%	2.32%	2.42%
District 52	108,138	89,308	83,920	1,280	2,201	1,328
	100.00%	82.59%	93.97%	1.43%	2.46%	1.49%
District 53	107,973	89,285	84,092	2,351	1,888	2,387
	100.00%	82.69%	94.18%	2.63%	2.11%	2.67%
District 54	107,987	94,612	92,324	170	1,569	183
	100.00%	87.61%	97.58%	0.18%	1.66%	0.19%
District 55	106,476	78,962	38,349	36,611	3,353	37,061
	100.00%	74.16%	48.57%	46.37%	4.25%	46.94%
District 56	108,119	82,323	66,485	6,024	8,585	6,276
	100.00%	76.14%	80.76%	7.32%	10.43%	7.62%
District 57	107,942	86,444	72,775	3,713	7,982	3,852
	100.00%	80.08%	84.19%	4.30%	9.23%	4.46%

District 58	107,049	83,835	50,472	5,975	26,009	6,370
	100.00%	78.31%	60.20%	7.13%	31.02%	7.60%
District 59	106,377	73,171	27,198	37,231	8,102	38,052
	100.00%	68.78%	37.17%	50.88%	11.07%	52.00%
District 60	107,975	83,582	67,861	7,437	6,584	7,685
	100.00%	77.41%	81.19%	8.90%	7.88%	9.19%
District 61	108,424	84,482	74,151	5,594	3,876	5,671
	100.00%	77.92%	87.77%	6.62%	4.59%	6.71%
District 62	108,336	78,167	69,554	1,598	6,105	1,665
	100.00%	72.15%	88.98%	2.04%	7.81%	2.13%
District 63	107,930	81,283	71,831	5,932	2,840	6,015
	100.00%	75.31%	88.37%	7.30%	3.49%	7.40%
District 64	107,976	81,427	67,831	10,891	2,038	11,028
	100.00%	75.41%	83.30%	13.38%	2.50%	13.54%
District 65	108,209	83,090	66,645	13,101	2,863	13,347
	100.00%	76.79%	80.21%	15.77%	3.45%	16.06%
District 66	108,187	82,620	70,824	4,344	6,689	4,460
	100.00%	76.37%	85.72%	5.26%	8.10%	5.40%
District 67	108,368	88,212	82,728	1,726	3,253	1,766
	100.00%	81.40%	93.78%	1.96%	3.69%	2.00%
District 68	108,360	90,141	86,571	868	1,978	910
	100.00%	83.19%	96.04%	0.96%	2.19%	1.01%
District 69	108,404	88,733	78,516	6,757	2,719	6,868
	100.00%	81.85%	88.49%	7.61%	3.06%	7.74%
District 70	108,442	94,140	92,342	422	944	429
	100.00%	86.81%	98.09%	0.45%	1.00%	0.46%

District Name	Total Pop	Total VAP	Non-Hisp White VAP	Non-Hisp Black VAP	Hispanic VAP	Tot. Black VAP
District 71	108,187	90,457	86,081	1,936	1,764	2,176
	100.00%	83.61%	95.16%	2.14%	1.95%	2.41%
District 72	108,391	85,701	75,108	4,705	5,354	4,844
	100.00%	79.07%	87.64%	5.49%	6.25%	5.65%
District 73	108,391	82,925	65,765	11,563	4,906	11,880
	100.00%	76.51%	79.31%	13.94%	5.92%	14.33%
District 74	108,403	88,910	85,941	491	1,968	528
	100.00%	82.02%	96.66%	0.55%	2.21%	0.59%
District 75	108,087	91,933	88,403	450	2,645	476
	100.00%	85.05%	96.16%	0.49%	2.88%	0.52%
District 76	108,275	89,184	82,756	1,424	4,532	1,602
	100.00%	82.37%	92.79%	1.60%	5.08%	1.80%
District 77	108,384	81,409	59,662	8,233	12,406	8,977
	100.00%	75.11%	73.29%	10.11%	15.24%	11.03%
District 78	108,380	80,597	59,339	15,978	4,610	16,268
	100.00%	74.37%	73.62%	19.82%	5.72%	20.18%
District 79	108,194	79,244	64,579	4,033	9,306	4,281
	100.00%	73.24%	81.49%	5.09%	11.74%	5.40%
District 80	108,460	89,143	81,994	5,124	1,537	5,191
	100.00%	82.19%	91.98%	5.75%	1.72%	5.82%
District 81	108,319	85,917	79,632	2,557	3,026	2,684
	100.00%	79.32%	92.68%	2.98%	3.52%	3.12%

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District 82	108,120	89,357	83,704	2,851	2,248	2,901
	100.00%	82.65%	93.67%	3.19%	2.52%	3.25%
District 83	108,175	89,967	85,614	945	2,615	1,023
	100.00%	83.17%	95.16%	1.05%	2.91%	1.14%
District 84	106,352	74,881	27,519	38,966	7,557	39,800
	100.00%	70.41%	36.75%	52.04%	10.09%	53.15%
District 85	108,085	84,819	73,086	3,607	7,007	3,790
	100.00%	78.47%	86.17%	4.25%	8.26%	4.47%
District 86	107,986	86,311	63,406	9,259	12,942	10,240
	100.00%	79.93%	73.46%	10.73%	14.99%	11.86%
District 87	108,283	90,674	82,063	2,440	4,992	2,596
	100.00%	83.74%	90.50%	2.69%	5.51%	2.86%
District 88	107,972	87,107	72,068	8,427	5,784	8,991
	100.00%	80.68%	82.74%	9.67%	6.64%	10.32%
District 89	108,435	91,558	86,323	643	3,499	713
	100.00%	84.44%	94.28%	0.70%	3.82%	0.78%
District 90	108,152	88,997	74,467	8,036	5,433	8,489
	100.00%	82.29%	83.67%	9.03%	6.10%	9.54%
District 91	108,191	96,133	91,377	527	3,415	584
	100.00%	88.85%	95.05%	0.55%	3.55%	0.61%
District 92	108,067	91,574	80,560	2,071	7,792	2,255
	100.00%	84.74%	87.97%	2.26%	8.51%	2.46%
District 93	106,340	77,461	34,090	37,619	5,049	38,772
	100.00%	72.84%	44.01%	48.57%	6.52%	50.05%
District 94	106,358	78,765	33,525	38,521	5,631	39,511
	100.00%	74.06%	42.56%	48.91%	7.15%	50.16%

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District Name	Total Pop	Total VAP	Non-Hisp White VAP	Non-Hisp Black VAP	Hispanic VAP	Tot. Black VAP
District 95	108,208	89,862	80,678	2,417	5,605	2,629
	100.00%	83.05%	89.78%	2.69%	6.24%	2.93%
District 96	108,296	81,310	71,251	3,128	5,410	3,303
	100.00%	75.08%	87.63%	3.85%	6.65%	4.06%
District 97	108,355	81,701	67,906	3,387	8,763	3,594
	100.00%	75.40%	83.12%	4.15%	10.73%	4.40%
District 98	107,942	85,967	75,241	3,108	6,187	3,274
	100.00%	79.64%	87.52%	3.62%	7.20%	3.81%
District 99	108,164	84,834	67,593	7,604	8,133	7,897
	100.00%	78.43%	79.68%	8.96%	9.59%	9.31%
District 100	108,403	89,126	75,662	2,775	9,286	2,993
	100.00%	82.22%	84.89%	3.11%	10.42%	3.36%
District 101	107,400	85,876	61,441	12,270	11,045	12,841
	100.00%	79.96%	71.55%	14.29%	12.86%	14.95%
District 102	106,793	80,588	24,595	2,362	52,931	3,091
	100.00%	75.46%	30.52%	2.93%	65.68%	3.84%
District 103	106,871	73,672	9,764	41,059	22,133	42,871
	100.00%	68.94%	13.25%	55.73%	30.04%	58.19%
District 104	106,508	77,694	24,124	39,590	12,773	41,287
	100.00%	72.95%	31.05%	50.96%	16.44%	53.14%
District 105	108,429	85,461	54,647	13,110	15,428	14,122
	100.00%	78.82%	63.94%	15.34%	18.05%	16.52%

District 106	108,426	94,319	61,805	2,948	28,431	3,741
	100.00%	86.99%	65.53%	3.13%	30.14%	3.97%
District 107	106,408	88,991	29,496	1,975	56,820	3,703
	100.00%	83.63%	33.14%	2.22%	63.85%	4.16%
District 108	106,556	73,276	17,904	41,942	12,466	44,345
	100.00%	68.77%	24.43%	57.24%	17.01%	60.52%
District 109	106,481	72,965	4,380	40,281	28,021	42,918
	100.00%	68.52%	6.00%	55.21%	38.40%	58.82%
District 110	106,368	82,368	11,516	1,461	68,896	2,249
	100.00%	77.44%	13.98%	1.77%	83.64%	2.73%
District 111	106,317	84,834	16,941	2,428	64,945	4,034
	100.00%	79.79%	19.97%	2.86%	76.56%	4.76%
District 112	106,623	77,843	19,767	3,220	53,454	3,689
	100.00%	73.01%	25.39%	4.14%	68.67%	4.74%
District 113	106,385	85,733	13,795	6,371	64,901	7,919
	100.00%	80.59%	16.09%	7.43%	75.70%	9.24%
District 114	106,381	81,429	15,607	882	63,825	1,491
	100.00%	76.54%	19.17%	1.08%	78.38%	1.83%
District 115	106,514	84,937	26,998	1,071	55,449	1,444
	100.00%	79.74%	31.79%	1.26%	65.28%	1.70%
District 116	107,150	79,007	36,362	3,537	36,639	3,954
	100.00%	73.73%	46.02%	4.48%	46.37%	5.00%
District 117	106,498	87,834	23,034	3,062	60,761	3,586
	100.00%	82.47%	26.22%	3.49%	69.18%	4.08%
District 118	107,546	74,932	29,714	22,813	20,794	23,740
	100.00%	69.67%	39.65%	30.44%	27.75%	31.68%

District Name	Total Pop	Total White VAP	Non-Hisp White VAP	Non-Hisp Black VAP	Hispanic VAP	Tot. Black VAP
District 119	108,116	77,355	49,651	6,535	19,456	6,997
	100.00%	71.55%	64.19%	8.45%	25.15%	9.05%
District 120	108,294	84,826	62,741	8,279	12,769	8,637
	100.00%	78.33%	73.96%	9.76%	15.05%	10.18%
Total	12,937,926	10,071,689	7,646,760	1,109,710	1,181,454	1,150,556
	100.00%	77.85%	75.92%	11.02%	11.73%	11.42%

County Split Assignments
1990 Total Population by Race and Ethnicity

Plan type: Florida House

Census Unit	Total Pop	Non-Hisp White	Non-Hisp Black	Total Hispanic	Total Black
Dade County					
District 101	2,260	538	564	1,043	604
District 102	86,987	17,146	2,467	66,484	3,382
District 103	106,871	12,529	63,604	29,711	66,227
District 104	106,508	27,621	60,056	17,173	62,551
District 105	108,429	64,628	19,897	20,774	21,411
District 106	108,426	68,069	3,902	35,026	4,950
District 107	106,408	33,740	2,543	69,204	4,682
District 108	106,556	21,231	66,965	17,028	70,568
District 109	106,481	5,824	63,478	36,729	67,074
District 110	106,368	15,858	2,425	87,343	3,492
District 111	106,317	21,749	3,318	80,515	5,347
District 112	106,623	28,387	4,063	72,172	4,688
District 113	106,385	17,964	8,918	78,641	10,810
District 114	106,381	21,391	1,145	82,393	1,952
District 115	106,514	33,717	1,368	69,597	1,839
District 116	107,150	48,736	4,944	50,055	5,524
District 117	106,498	28,207	4,318	72,769	4,952
District 118	107,546	40,392	35,758	29,132	37,115
District 119	108,116	65,983	10,892	28,792	11,603
District 120	30,270	11,897	8,996	8,826	9,222
Total Dade County	1,937,094	585,607	369,621	953,407	397,993

APPENDIX N

TESTIMONY OF DARIO MORENO

TR. II, 14

* * * *

[14] BY MR. HEBERT:

Q All right. Are there any other pockets of growth in particular with regard to the Hispanic population from 1980 to 1990 or other sections of Dade County that have large geographic concentrations of Hispanic voters? And if you could identify the ethnicity of the Hispanics that you're talking about.

A Well, the two most dramatic areas of growth in Dade County for Hispanics are along the beach, Miami Beach. Miami Beach in 1980 census was only 30 percent Hispanic. Now it's 49 percent Hispanic. And the most dramatic growth though has been in this area, this Kendall Lakes, West Kendall area.

Q Is there a—where is the Homestead section of Dade County and could you describe whether or not there has been any growth there and what the nature of that growth has been, if any?

A Homestead area is over here (indicating).

* * * *

[17] For example, in the 1989 election, the Windward neighborhood, which is basically a poor neighborhood in—poor Puerto Rican neighborhood, basically a transition—another transition zone between blacks and Hispanics—voted less than Cuban Americans but still gave a majority of their votes to Ileana Ros-Lehtinen in her race against Cheryl Richardson (sic), at least those precincts in Windward did.

In the 1980's we had the arrival of—the census say—seventy-nine thousand Nicaraguans. Everyone I spoke to—demographers, sociologists, social workers in Dade

County—believe that's undercounted by at least thirty thousand. There's probably closer to a hundred and ten thousand Nicaraguans in Dade County. And the Nicaraguans have settled in—it's hard to tell on this map; I assume this is my university, FIU, that little white spot—have settled here in the Sweetwater area, a large number, Sweetwater, Westchester, Nicaraguans; some Nicaraguans in the east Little Havana, north Little Havana area.

Also in the 1980's we had refugees from Colombia [18] escaping the drug war. These tend to be wealthier and they moved into the West Kendall area; same with Peruvians in the 1980's. But the distinction among these people are that they tend to be more conservative, all the groups. All the Hispanic ethnic groups by nationality tend to be more conservative than their counterparts in other large U.S. metropolitan areas.

Also, I think we need to ask a question: Why did Miami become a magnet for four hundred thousand Latin American refugees during the 1980's? And the reason for it was the already existence of this large Hispanic enclave created by Cuban Americans, in which Latin Americans felt that they could come here without suffering the kind of language barriers and discrimination barriers that they would suffer in other large U.S. cities. So, the existence of the Cuban enclave was a magnet for the Hispanic groups.

* * * *

TESTIMONY OF MIGUEL DEGRANDY

TR. IV, 51

[51] Q. The seat you refer to as the access seat in the state's plan is which district and who is the incumbent?

A. One sixteen, the yellow district, Art Simon.

Q. And that district is now drawn with something approaching, what, 50 percent?

A. Forty-eight percent, I believe.

* * * *

TESTIMONY OF GEORGE MEIER

TR. VI, 210-211

• • • •

[210] Q What about voting age population?

A Slightly over 50 percent, five zero point five is voting age Hispanic population.

Q And as I heard you say there are nine Hispanic voting age populations in this area?

A Yes, sir, there are nine districts in this, in the Florida plan in which the Hispanic voting age population constitutes a majority.

Q Okay. And so that is more than half then of the districts wholly contained within Dade County?

A The population of Dade County is such that if you could draw all districts solely within Dade County, the populations such to support just under 18 districts, I believe it is 17.94 districts can be drawn in the one point nine million, within using the nine point one millon people in Dade County.

With five zero point five percent of the voting age population being identified in the census as Hispanic, nine out of 18 is, in fact, directly proportional to that 50 percent of the voting age population.

Q Half the voting age population, half of the number of districts?

A Yes, sir.

• • • •

[211] Q Well, while you are still on that one let's just talk about the black population a little bit.

What percentage of the Dade County population do they compose?

A I believe it's just at 20 percent of the total populations non-Hispanic black.

• • • •

TESTIMONY OF WILLIAM DE GROVE

TR. VII, 5-24

• • • •

[5] WILLIAM M. DE GROVE

was called as a witness, having first been duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

• • • •

[6] (Whereupon, Joint Exhibit Nos. 1, 2 and 3 were marked for identification.)

(Pause) Did we swear the witness? That's what I was waiting for.

DIRECT EXAMINATION

BY MS. BUTLER:

• • • •

[7] Q Did you have occasion to use those tools in the course of your employment with the state?

A Several times, yes. I have published work in regression analysis some years back while employed with the state.

Q Do you have with you at the stand a collection of exhibits that are stapled together and the first pages of which are affidavits?

A Yes, I do.

Q We have now marked this as Defendant's Joint Exhibit 1 for identification. Does the second page of Joint Exhibit 1 contain your current vita?

A Yes, it does.

Q And the articles that you mentioned having published concerning some of these statistical tools, are those the ones listed in your vita?

A Yes.

Q Do you have occasion in your work to make use of regression analysis?

A Quite frequently. We do literally dozens of regressions in our committee on reapportionment.

Q I think you commented to me you do regression analysis in your sleep?

A I dream about it occasionally.

* * * *

[8] MS. BUTLER: Your Honor, I would like to tender Mr. De Grove to this court as an expert in the use of statistical devices for the purpose of offering expert opinion.

JUDGE HATCHETT: Do you stipulate?

MR. HEBERT: The proffer, as I heard it was an expert in the use of statistical devices. I will agree that he is an expert in the use of statistics, if that suffices, which I think it should.

THE WITNESS: Thank you.

MS. BUTLER: I should add, also, in demography. He is a demographer and this is his primary occupation in life.

MR. HEBERT: I would stipulate he's a demographer as well.

BY MS. BUTLER:

Q Have you brought with you to the stand today, Mr. De Grove, a number of exhibits?

A Yes.

* * * *

[10] Q If you will, Mr. De Grove, would you turn to what is the third page that has at the top of it Select Demographic Data for Florida?

A I have it.

Q Can you explain to us what this chart contains?

JUDGE STAFFORD: Is this the one 1950 to 1990?

MS. BUTLER: It is, Your Honor.

THE WITNESS: Yes, sir.

JUDGE STAFFORD: Okay, thank you.

BY MS. BUTLER:

Q All right.

A These are some selected data showing the composition and trends in the black population and Hispanic population in Florida over the last—for the Hispanic populations the last four decades and for the black the last five decades. These data are simply pulled from census materials available in any library, and the references are attached for each [11] year that's on the chart.

Q Go ahead, what do you see when you examine the change over time?

A You simply see the—well, let's look at the black population first. You see it's on the second line, it's total, the percent of the state that's black and the median age of the black population, and as you read from left to right you see its growth over the decades and its change in the relative percentage of the state. In 1950, the state was 21.8 percent black. That has gradually declined to 1990 where it's 13.6 percent. You also have the percent of the black population which are native Floridians, and that percentage has held fairly steady in the sixties, 60 percents.

Q What about the Hispanic population?

A The next panel down gives similar data for Hispanics. I do not have the data for 1950, but in 1960 you can see that we had in the state 70,195 Hispanics comprising only 1.4 percent of the state's population. 40.6 percent of these were native Floridians, and significantly, the largest group were living in Dade County and the second largest group lived in Pinellas/Hillsborough.

As you follow the decades forward to 1990, the Hispanic population has grown dramatically. Its percentage of the state's total has now risen to 12.2, and the percent [12] of Hispanics who are native has fallen, as you would expect, because of immigration. We don't have the data for 1991.

JUDGE STAFFORD: You don't have it for '90?

THE WITNESS: It's not available from the census bureau.

BY MS. BUTLER:

Q Why did you prepare this particular chart?

A Well, I wanted the Court to be aware of the percentage of the population in 1960 that was Hispanic in this state and also forward on. I think it's relevant information to know what proportion of the population they comprised historically in the state.

Q All right, I would like for you now to explain the next several pages. I don't think we're going to deal with any of these, but since they're here we might just tell the Court what the packet is referring to, the one that's just the title page for the census.

A That's simply the reference page for the previous chart, one page for each decade.

Q And the next page?

A Earlier, '90, '80, '70.

Q What is the next page that we need to look at in your exhibit here?

A It begins with a graph.

Q Would it be this page, the graph paper with the—

[13] A Yes.

Q That's actually on Page 8.

JUDGE VINSON: Got it.

MS. BUTLER: Okay.

BY MS. BUTLER:

Q Could you explain to the Court what this is?

A Yes, and I would like to use ink pen and paper to do this, if the Court would allow.

Q By the ink pen, do you mean chart that's—

A Magic marker.

Q May he do that?

JUDGE HATCHETT: Is it possible for him to give his ultimate conclusion without doing this?

MS. BUTLER: It certainly is, Your Honor, but there seems to be some question about whether this methodology actually produces results that are accurate, and if there's any question about that, I certainly want to explain.

BY MS. BUTLER:

Q Would you tell us what you ultimately conclude based on the chart that's here in the—what the purpose of the chart was that you were trying to deal with?

A What we are exploring here, if you'll read the written material on this chart, is the relationship between the percent of VAP, voting age population, in Dade County which is noncitizen. That—the relation of that variable to the [14] percent of the VAP that is Hispanic, and that's done by a bivariate regression model. And what you see in front of you is the regression line. It's the best fit line to the census tracts in Dade County where the Y axis is the percent noncitizen.

Q Would you point out the Y axis in case there's any question about that? Probably really would be easier for him to do that from here.

JUDGE STAFFORD: Is that the vertical or horizontal axis?

THE WITNESS: If I could go to the board.

MS. BUTLER: You'll know more about it than you ever wanted to.

BY MS. BUTLER:

Q Before you—will you explain where the information came from that's going to go into this chart, where the actual numbers come from?

A The census bureau has released certain detailed data on magnetic tapes. Those are called summary tape files. The summary tape file 3-A—and let me explain that. The 3 indicates that that's detail data from the sample questionnaire. Every household receives a questionnaire. A proportion of households receive a detailed questionnaire. Detailed questionnaires ask very in-depth

questions, and the questions we are trying to answer here are not asked of [15] everybody. That's what the 3 means. The A simply means that the data have been aggregated at the—no lower than the bloc group level. Bloc groups are 5- or 600 persons on average. They are the unit just below census tract, geographic unit.

Q Is it information also aggregated at the census tract level?

A Yes, the tape reports aggregates from bloc group up so that you have an aggregate piece of information for the tract, an aggregate piece of information for the county, and so on up the line. There is aggregated data for the state.

Q So your Y axis then, percent not citizen—

A What we are trying to relate here is the Y axis, which is percent noncitizen, to the X axis, which is percent VAP Hispanic. Both of these are VAP, let me underscore that. The census bureau has given us on this tape the percent of VAP who are citizens and who are not citizens. But they have not told us whether those people are Hispanic or whether they're Anglo or black or white. So—and they have told us, of course, the percent VAP—percent VAP Hispanic in all the census units.

So the statistics involved is to relate these two variables and attempt to extract some usable information from it. And we use bivariate regression to do this. And we—what we plot are the locations of the census tracts in [16] Dade County. For example, if there is a census tract that's 73 perecnt Hispanic and it's 43 perecnt noncitizen, it would land right about here. (Indicating).

Then, as I believe testimony has been issued in the Court before, these data are fitted—these census tract coordinates are fitted with a least squares line. That means it's the best straight line that can go through the dots minimizing the distance squared of the dots from the line. That's why it's called the least squares line. Statisticians generally accept this—I'd say universally accept the least squares fit as the best linear model. Linear

meaning we have fit the data with a straight line. There are other ways to fit the data.

JUDGE HATCHETT: Mr. De Grove, we understand the methodology.

MS. BUTLER: Are you ready to be cross-examined on it, Your Honor?

JUDGE HATCHETT: No, we're ready for the next question.

BY MS. BUTLER:

Q You were about to tell us when you cross the 100 percent point this tells you the estimate of the line?

A Let me tell you the 100 percent line on up, and the zero percent line, and you'll see that this least squares line intersects the two lines and it gives you two points of [17] major interest, and let me explain. The intersection at this point is the percent of those tracts with zero Hispanics who are noncitizens, and I found that this line intersected at about nine and a half percent, or .095, .95, nine and a half percent, indicating that if you have a track with no Hispanics in it, you would expect nine and a half percent noncitizens. As the line goes across to the 100 percent VAP Hispanic, the intersection point is about .55. If you can look on my chart, you will see that, and if you can follow across with your finger.

This represents, then, the—by 100 percent, a tract of all Hispanic persons, VAP, and the model implies that 55 percent—I didn't draw this exactly right—implies that 55 percent of them would be noncitizens.

Q Fifty-five percent of the Hispanic population in Dade County are not citizens according to this calculation?

A No. Fifty-five percent of the persons in a tract, which is 100 percent Hispanic, are not noncitizens.

Q From which you then assume what?

A Well, we—I examined an independent—a test of this. I was provided the census record by a colleague for the whole county in which you can calculate the percent

of Hispanics in the entire county who are noncitizens. The colleague gave me the figure of 32—32 and a fraction percent.

[18] Q Let's make sure we clarify that. That's the percent of the total population VAP that is not a citizen, is that correct, 33 percent?

A I'm commenting on the Hispanic now, Hispanic VAP in Dade County, Hispanic VAP in Dade County. My colleague, who examined the census bureau record—there's a record for Dade County, a single record from which you can read directly VAP Hispanics and total noncitizens. You can do simple division and derive a figure. I did not do the work, but I would—I took the VAP Hispanic in Dade County, which we know to be 50 percent, and it's been introduced in evidence in this court. And if you take the 50 percent and project it up to the regression line I found, it crosses very close to 32 percent.

Q What that means then is that in precincts that are about 50 percent Hispanic, you're going to find 32 percent noncitizens?

A That's correct.

Q And 32 percent is the rate of noncitizenship for the entire county?

A It's the overall rate, yes, that's correct.

Q Do you need to do anything more here or can you return to the stand?

A I think that will suffice.

Q Now the next several pages of the exhibit, Mr. De Grove, [19] what are these figures?

A I provided the actual computer run on this regression so that anyone interested or knowledgeable in these matters can review it.

Q With the census data they could read your analysis?

A Absolutely, with a couple of warnings. I have deleted the two tracts which are in fact shifts and I have deleted the one tract which has no population. So this is a regression model with 264 observations.

JUDGE VINSON: Did you delete one that had no population?

THE WITNESS: There's a tract in Dade County with no persons, so I did not use an analysis, and there are two tracts which are shifts, temporarily dot in Dade County, I didn't think they had any relevance.

BY MS. BUTLER:

Q Mr. De Grove, based on your analysis, what percentage of the Hispanic voting age population in Dade County are citizens?

A Based upon this analysis, it would be about 32 and a half percent—I'm sorry 32 and a half percent would be noncitizens.

Q Of the whole county now, let's just talk about the Hispanics. What percentage of the Hispanic VAP in Dade County are not citizens?

[20] A Are not citizens? About 32 and a half percent.

Q Look at your—

A Would we work that out?

Q Look at your 100 percent line and tell me what that figure is. Isn't this a percent of Hispanics in Dade County that are not citizens?

MS. WRIGHT: Objection, Your Honor, that is certainly not his testimony. It's absolutely incorrect based on what he said.

THE WITNESS: I'm sorry—

MR. ZACK: I think we're after the truth.

THE WITNESS: The right-hand side of this line—It's early in the morning, I'm sorry—is a tract that is 100 percent Hispanic. In that tract, 55 percent of the VAP are noncitizens. The 32 percent is the average for the entire county.

Q I'll ask you again, see if we can't get this straight here. What percent of all the Hispanic citizens do you estimate from this are not citizens—Hispanic population, voting age, are not citizens?

A Fifty-five percent of Hispanic VAP are not citizens.

MR. HEBERT: Your Honor, if I may—

JUDGE HATCHETT: You'll be able to develop that on cross. That may be the easiest way to get to this.

JUDGE VINSON: There is some confusion. Of all the [21] citizens in Dade County, 32 percent are not citizens.

THE WITNESS: Yes, sir. That is exactly right.

JUDGE VINSON: If you have a tract that's 100 percent Hispanic, you would expect that to have 55 percent.

THE WITNESS: Yes, sir, that's exactly right.

JUDGE VINSON: I don't see how we can say it any way clearer.

MS. BUTLER: Are we clear now?

BY MS. BUTLER:

Q Again, doctor—Mr. De Grove, this is the standard methodology by which you would estimate the percent noncitizens for the entire Hispanic population. Is that an accurate statement?

A I think so, yes.

Q Now, if you will turn to what's—if we may, could we mark this handwritten chart as an exhibit to this testimony?

JUDGE HATCHETT: Yes.

MS. BUTLER: This will be Defendant's Joint Exhibit 4.

THE CLERK: Joint.

(Joint Exhibit No. 4 was marked for identification.)

MS. BUTLER: No objection. I'd like to go ahead and move that into evidence.

MR. HEBERT: No objection.

[22] MR. RUMBERGER: No objection.

JUDGE HATCHETT: Admit it.

(Joint Exhibit No. 4 received into evidence.)

BY MS. BUTLER:

Q Return to Joint Exhibit 2 which is titled at the top of it Adjustment For Citizenship, Dade County Districts.

A I have it.

Q Will you explain to use, please, what this exhibit is?

A Yes, I—what I have done here is contrast the Reaves/Brown/Hargrett plan for the House of Representatives and the State's plan for the House of Represenatives. I have shown the original data for each plan, total VAP, Hispanic VAP, all other VAP and percent Hispanic.

Q Why don't you use a first cell here, District 103, which is in the left-hand corner of the charts, just to explain to the Court what each of these numbers is in that bloc. Maybe you can simply do that.

A Can I put this on a piece of paper real quickly?

Q I think we're about to test the patience of the Court. They've got it in front of them. Just explain to them, what is the adjustment factor, for example? That's probably the most important piece of information.

A Let's look at District 103. We show the original data in the left column. We show the adjustment factors, referring right over to the graph, 55 percent of Hispanics, [23] VAP, are noncitizens, and approximately ten percent, actually .0956 of all other VAP are noncitizens. So I have adjusted the original data by subtracting those proportions from the original data, and have provided a third column. For example, the 51,752 Hispanics, because we know that 55.07 percent of them are noncitizens, those persons are removed from the 51,752 to produce a new figure. 23,252. From the all other VAP we know that approximately ten percent are noncitizens. Those persons are removed from the 26,843 to produce a new figure of VAP citizens. The two figures are summed to produce the new total VAP, which is now citizens, 47,529, and new percentage Hispanic as calculated.

Q So for this particular district, the bottom line is 48.92 percent of the citizen population VAP is Hispanic?

A That's correct.

Q Now, is that the same figure that's reported for each and every one of the districts on the page?

A Yes, I've done the same calculation for all the districts in Reaves/Brown/Hargrett and in the state's plan.

Q I think we're calling it the Florida plan now.

A Florida plan.

Q All right, so after computing these calculations, Mr. De Grove, how many of the districts that began as a majority Hispanic districts in the Reaves/Brown plan, are [24] majority Hispanic in terms of the citizen VAP?

A Only three of 11.

• • • •

TESTIMONY OF WILLIE LOGAN

TR. VII 73-77

[73] A Well, I actually, for the past couple years, I've been involved in preparing for reapportionment, first ensuring that people were counted and participated in the census. Second, I participated in any number of workshops that were held by the National Conference of State Legislators, NAACP—

Q Slowly.

A —the NAACP and many other organizations around the nation in preparing for the upcoming apportionment process. As the Legislature received the census data, I participated in the fall, as it relates to becoming familiar, with where were the population pockets and particularly as it relates to the black community throughout the State of Florida. I attended most of the 34 public hearings. I met with reapportionment task forces in the black community particularly in Dade, in Broward County. I also traveled throughout the State of Florida in meetings from black constituents. I worked very

closely with the NAACP from a statewide perspective, and I've participated in many meetings with the members of the black caucus and members of both the Democratic and Republican parties as it relates to the reapportionment process.

• • • •

[74] BY MR. PETERS:

Q You are a member of the black caucus?

A Yes, sir.

Q What role did the black caucus play in the creation and passage of what we now call the State House plan? My concerns are particularly Dade County, but—

A Well, sir, let me just back up a little bit. The black caucus originally in early fall identified areas within the state that we felt there was sufficient amount of population in order to attempt to create both a majority black disrict and access black districts. We adopted a definition which was prepared by Representative Jones, which defined—which would reflect the black district and also which would be an accurate black district.

• • • •

[75] A * * * We included in that the 15 black districts that are within the State plan, with some modifications, and some modifications as it relates to this Escambia County District. I would say to you, sir, that 96 to 98 percent of the configuration of the districts within the joint resolution were the ones that were proposed by the black caucus.

Q What other members of the black caucus participated in this determination? Was there disagreement within the caucus as to that determination?

A Well, there was no disagreement until January 27th, that Super Bowl—, actually the two days preceding Super Bowl weekend. Up to that point, Senator Meek, Representative Jones, Burke, myself, Representative Clark, Hargrett, Reddick, Brown, Holzendorf and Lawson, all participated in the drawing of those districts. And

there was a concensus among the members of the caucus as relates to the number of districts that we would draw.

Q Talking about Dade County now?

A Well, in Dade County, Representative Burke, Jones, Senator Meek and myself. Representative Reaves, who's a doctor, is the only member from Dade County not on the reapportionment committee, who said that he was not going to [76] be involved in reapportionment, and, quite frankly, did not participate in any meetings we had up until that Super Bowl weekend. And this started back in September of 1991.

Q So the caucus involved in a process beginning in September?

A Well, yes, that's when we hit the census information.

Q Yes, sir.

A Yes, sir.

Q And Mr. Reaves' participation emerged some time after the first—

A Super Bowl weekend.

Q Were there occasions for the black caucus within itself to have votes on the emerging House plan?

A Yes, we did, and quite frankly, there was never any controversy in terms of the 16 potential districts that could be drawn, 15 of which we thought we could effectively elect black candidates, one of which we thought to have an influence on race. And that was the concensus that was brought on early on. What we worked on from that point was actually defining exactly where those lines should be.

And by the way, sir, we adopted, particularly in Dade and Broward County, the plan that was recommended by the Dade Fair Reapportionment Committee and by the Broward Fair Reapportionment Committee, and those House districts are essentially what was recommended by those committees. [77] And those committees, unlike earlier presentation, were not made up of a given fraction of the community. For example, in Dade County it was the black lawyers, black psychologists, black accountants,

NAACP, the laymen's group, black educators, black social workers. There were about 12 black organizations that came together as one entity and worked over about a five-month period and came and made a presentation before the Legislature at the Opa-Locka public hearing, also the downtown public hearing and in the Broward County public hearing, recommending the districts as you see them in this joint resolution with only minor modifications.

* * * *

TESTIMONY OF WILLIE LOGAN

TR. VII, 98-99

* * * *

[98] Q Do you believe that this plan, this State plan, Florida plan, adequately represents Hispanics in the Dade County area?

A Yes, and I'm really happy someone asked that question. You know, when we first started drawing these districts, we took the 1.89 million people in Dade County, we took the percentage of Hispanics, which is 50 percent. We took the percentage of blacks and took the percentage of whites. And the numbers we came out with which were nonHispanics, four blacks and five whites. Of course that district ended up being five blacks and four whites and nonHispanics, and we feel, and I personally feel, that that adequately represents the proportionality of blacks, Hispanics and whites in a multiculture, multiethnic community.

TESTIMONY OF LEON RUSSELL

TR. VII, 139

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[139] MR. PETERS: Judge, in the absence of a stipulation we would tender Mr. Leon Russell. His testimony will be to the point, to the point that the NAACP supports

the House plan Dade component that he participated in implement, drafting the plan, that he endorses the plan.

That is, that is his testimony. If they will so stipulate we can save half an hour, Judge.

MR. BURR: We will make that stipulation with respect to Dade County.

MR. PETERS: Yes, sir. That's all.

* * * *

TESTIMONY OF PETER WALLACE

TR. VII, 164

* * * *

[164] There are 18 districts controlled by Dade County. There were nine solid majority Hispanic districts. There was one 47 percent Hispanic district VAP which had, has every prospect of becoming a majority VAP Hispanic district in the very near future because of growth trends.

There were four seats with a clear black VAP majority. Three seats, three seats where there would be a clear Anglo majority, and one black influence district which is presently held by a black member of the House.

It was carefully balanced. It was carefully crafted. There was a great deal of input from members of the House from Dade County, including black, including Hispanic, and including Anglo members.

We were very proud of that product, and I do believe that it was, represents the best and most fair result as a Dade County redistricting map for this next 10 years.

* * * *

COURT RULING

TR. VIII, 53

* * * *

[53] The Court finds that the plaintiffs have shown a fourth Hispanic district can be drawn in accordance with the Gingles standard, but the plaintiffs have failed to prove that a fourth Hispanic district can be drawn without

creating a regressive effect upon Afro-American voters in Dade County and South Florida.

Consequently, under Supreme Court precedent, this Court must give deference to the state policy as expressed in the Florida plan as validated by the Florida Supreme Court.

* * * *

COURT RULING

TR. VIII, 82

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[82] JUDGE HATCHETT: We're prepared to make a ruling as to the House at this time. The Court finds that under the totality of the circumstances the plaintiffs have shown a violation of Section 2 in that the plaintiffs have shown that more than nine Hispanic districts may be drawn without having or creating a regressive effect upon black voters in South Florida and in Dade County.

* * * *

REMEDIAL HEARING

TR. VIII, 97-98

* * * *

[97] JUDGE HATCHETT: We don't—we do not intend to have any more evidence regarding plans. If you want to [98] make about a ten-minute argument in support of an existing plan, you may do so. Or you may make an argument urging the Court to create a plan. But we do not intend to hear any more evidence regarding plans.

MR. PETERS: Judge, for the record, may the House respectfully object to your ruling. This is a very complex matter. The Court is aware there are competing conflicting interests within Dade County between the black community, the Hispanic community and, indeed, the Anglo community. The Court has heard the testimony as to black community of interest affecting the Dade/Broward intercept. We would submit to the Court that the plans

that are being tendered exceed Dade County, go into Broward County and, in fact, violate that fundamental principal that the NAACP and the House have attempted to protect.

With all due respect to the Court, the House would ask for the opportunity to tender to the Court appropriate data to compare the plans tendered, our plan, with an overlay, to enable this Court to proceed circumspectfully and in a manner free from taint and arbitrariness from discrimination per cases cited in our remedies memorandum. We have gone this far, Judge. We have spent millions of dollars to do this. In this environment, like a used car auction, is just not up to task.

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TRANSCRIPT OF PROCEEDINGS
6/26/92

TR. I, 7

* * * *

[7] Document 453, House defendants' emergency motion for reconsideration. Denied.

Document 455, NAACP's motion for reconsideration. Denied.

Document 459, plaintiffs Reaves, Brown and Hargrett emergency motion to conduct Senate redistricting hearing and supplemental renewed motion for legislative redistricting. Denied.

Document 477, legislative defendants' emergency motion for reconsideration, and in the alternative, motion for enlargement of time. Denied.

Document 478, plaintiffs' motion to strike proposed state Senate redistricting submitted by Margolis and Wetherell. That will remain pending for the moment.

Document 479, House defendants' motion in limine and opposition to consolidating. I will tell you more about that in just a moment.

Document No. 481, defendants Chiles, Butterworth and Smith's emergency motion for reconsideration. Denied.

We will hear argument on the following motions:

Document No. 482, Alberto Cardenas' motion for leave to appear PHV;

Document No. 483, Alan K. Fertel, motion for leave to appear;

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APPENDIX O

DEFENDANTS JOINT EXHIBIT 2

ADJUSTMENT FOR CITIZENSHIP
DADE COUNTY DISTRICTS

REAVES/BROWN/HARGRETT — SJR 2-G

	District No. 103			District No. 102		
	Original Data	Adjustment Factor	Adjustment for Citizenship	Original Data	Adjustment Factor	Adjustment for Citizenship
Total VAP	78,595		47,529	80,588		48,795
Hispanic VAP	51,752	0.5507	23,252	52,931	0.5507	23,782
All other VAP	26,843	0.0956	24,277	27,657	0.0956	25,013
% Hispanic VAP	65.85%		48.92%	65.68%		48.74%

	District No. 105			District No. 107		
	Original Data	Adjustment Factor	Adjustment for Citizenship	Original Data	Adjustment Factor	Adjustment for Citizenship
Total VAP	89,563		52,068	88,991		54,625
Hispanic VAP	63,575	0.5507	28,564	56,820	0.5507	25,529
All other VAP	25,988	0.0956	23,504	32,171	0.0956	29,095
% Hispanic VAP	70.98%		54.86%	63.85%		46.74%

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	District No. 109			District No. 110		
	Original Data	Adjustment Factor	Adjustment for Citizenship	Original Data	Adjustment Factor	Adjustment for Citizenship
Total VAP	80,435		49,103	82,368		43,139
Hispanic VAP	51,951	0.5507	23,342	68,896	0.5507	30,955
All other VAP	28,484	0.0956	25,761	13,472	0.0956	12,184
% Hispanic VAP	64.59%		47.54%	83.64%		71.76%

	District No. 110			District No. 111		
	Original Data	Adjustment Factor	Adjustment for Citizenship	Original Data	Adjustment Factor	Adjustment for Citizenship
Total VAP	79,051		47,897	84,834		47,167
Hispanic VAP	51,849	0.5507	23,296	64,945	0.5507	29,180
All other VAP	27,202	0.0956	24,601	19,889	0.0956	17,988
% Hispanic VAP	65.59%		48.64%	76.56%		61.86%

	District No. 111			District No. 112		
	Original Data	Adjustment Factor	Adjustment for Citizenship	Original Data	Adjustment Factor	Adjustment for Citizenship
Total VAP	82,372		45,194	77,843		46,074
Hispanic VAP	64,389	0.5507	28,930	53,454	0.5507	24,017
All other VAP	17,983	0.0956	16,264	24,389	0.0956	22,057
% Hispanic VAP	78.17%		64.01%	68.67%		52.13%

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DEFENDANTS JOINT EXHIBIT 2—Continued

REAVES/BROWN/HARGRETT SJR 2-G

	District No. 112			District No. 113		
	Original Data	Adjustment Factor	Adjustment for Citizenship	Original Data	Adjustment Factor	Adjustment for Citizenship
Total VAP	87,677		53,547	85,733		48,000
Hispanic VAP	56,576	0.5507	25,420	64,901	0.5507	29,160
All other VAP	31,101	0.0956	28,128	20,832	0.0956	18,840
% Hispanic VAP	64.53%		47.47%	75.70%		60.75%

	District No. 113			District No. 114		
	Original Data	Adjustment Factor	Adjustment for Citizenship	Original Data	Adjustment Factor	Adjustment for Citizenship
Total VAP	87,281		52,815	81,429		44,598
Hispanic VAP	57,399	0.5507	25,789	63,825	0.5507	28,677
All other VAP	29,882	0.0956	27,025	17,604	0.0956	15,921
% Hispanic VAP	65.76%		48.83%	78.38%		64.30%

	District No. 114			District No. 115		
	Original Data	Adjustment Factor	Adjustment for Citizenship	Original Data	Adjustment Factor	Adjustment for Citizenship
Total VAP	85,334		51,325	84,937		51,582
Hispanic VAP	56,803	0.5507	25,522	55,449	0.5507	24,913
All other VAP	28,531	0.0956	25,803	29,488	0.0956	26,669
% Hispanic VAP	66.57%		49.73%	65.28%		48.30%

	District No. 115			District No. 117		
	Original Data	Adjustment Factor	Adjustment for Citizenship	Original Data	Adjustment Factor	Adjustment for Citizenship
Total VAP	83,264		50,351	87,834		51,785
Hispanic VAP	54,829	0.5507	24,635	60,761	0.5507	27,300
All other VAP	28,435	0.0956	25,717	27,073	0.0956	24,485
% Hispanic VAP	65.85%		48.93%	69.18%		52.72%

	District No. 116		
	Original Data	Adjustment Factor	Adjustment for Citizenship
Total VAP	82,453		48,970
Hispanic VAP	56,252	0.5507	25,274
All other VAP	26,201	0.0956	23,696
% Hispanic VAP	68.22%		51.61%

	District No. 117		
	Original Data	Adjustment Factor	Adjustment for Citizenship
Total VAP	82,801		50,154
Hispanic VAP	54,342	0.5507	24,416
All other VAP	28,459	0.0956	25,738
% Hispanic VAP	65.63%		48.68%

APPENDIX P

EXCERPT FROM LEGISLATIVE DEFENDANTS' EMERGENCY MOTION FOR RECONSIDERATION AND, IN THE ALTERNATIVE, MOTION FOR ENLARGEMENT OF TIME TO RESPOND TO THE THIRD AMENDED COMPLAINT

1. The Legislative Defendants, Gwen Margolis, Jack Gordon, T. K. Wetherell, and Peter R. Wallace, respectfully move this Court to reconsider its Order dated June 22, 1992 granting Plaintiffs' Motion to file a Third Amended Complaint. For the reasons stated in these Defendants' April 15, 1992 and May 22, 1992 Motions to Dismiss which they adopt and incorporate by reference, challenges to Florida's redistricting plan properly resides before the Florida Supreme Court at this time. Accordingly, these Defendants submit the Motion for Leave to Amend should have been denied and these Plaintiffs should be required to file in the Florida Supreme Court in light of its continuing jurisdiction on this matter and these Plaintiffs' presence and participation, without reservation, before that Court's jurisdiction.

* * * *

APPENDIX Q

STATUTORY PROVISIONS

§ 1973. Denial or abridgement of right to vote on account of race of color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

EDITOR'S NOTE

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No. 92-519

FILED

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OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

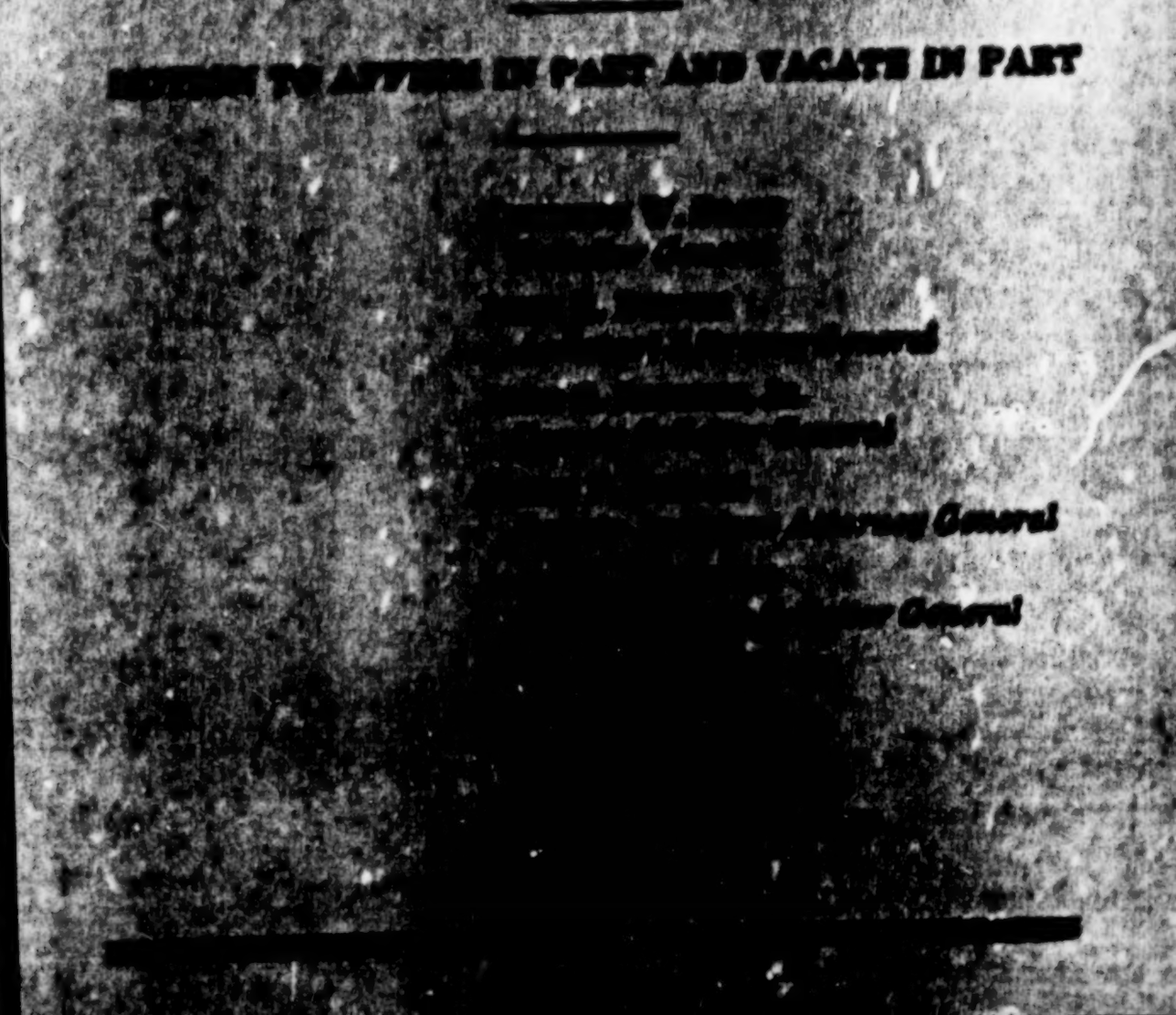
T.K. WETHERELL, ET AL., APPELLANTS

v.

MIGUEL DE GRANDY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

MOTION TO AFFIRM IN PART AND VACATE IN PART



QUESTIONS PRESENTED

1. Whether a showing under this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), that a racial minority group has been denied an equal opportunity to elect representatives of its choice to a statewide legislative body may be rebutted by evidence that the minority group is proportionally represented in a particular area of the State in which additional minority districts can be drawn, but is not proportionally represented in the State as a whole.

2. Whether the district court's finding that Hispanics are sufficiently numerous and geographically compact to constitute a voting majority in two additional districts is clearly erroneous.

3. Whether the district court abused its discretion in imposing a court-ordered plan for post-1992 elections without giving the State a greater opportunity to show that the plan interferes with state policy more than necessary to remedy the violation.

4. Whether the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), required the district court to abstain from deciding the United States' Section 2 claim when a similar Section 2 claim was made in a state court proceeding, but the United States was not a party to that proceeding.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

MOTION TO AFFIRM IN PART AND VACATE IN PART

OPINION BELOW

The opinion of the three-judge district court is reported at 794 F. Supp. 1076.

JURISDICTION

The judgment of the three-judge district court was entered on July 2, 1992. Notices of appeal were filed on July 24, 1992, and July 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

1. On June 23, 1992, the United States filed suit against the State of Florida, alleging that the State's redistricting plan for the Florida House of Representatives violated Section 2 of the Voting Rights Act,

42 U.S.C. 1973. App., *infra*, 1a-8a. The United States alleged that the State's plan fragments the Hispanic population in the Dade County area so that Hispanics comprise a majority of the voting age population (VAP) in only nine House districts. App., *infra*, 3a. If districts in Dade County were "divided into equally populated legislative districts which respect communities of interests and follow other nondiscriminatory plan-drawing criteria, Hispanics would constitute a significant voting-age majority of the population in two additional districts." App., *infra*, 4a. Citing racially polarized voting and other factors, the complaint alleged that "[u]nder the totality of circumstances, * * * the redistricting plan[] * * * deprive[s] Hispanic citizens * * * in the State of Florida of an equal opportunity to participate in the political process and to elect candidates of their choice to the State Legislature." App., *infra*, 5a.[1]

The United States' suit was consolidated with a redistricting suit that had been filed by another group of plaintiffs (the De Grandy plaintiffs), who had made allegations similar to those made by the

[1] The United States also alleged that the State's redistricting plan for the state Senate violated Section 2. That claim is not at issue on this appeal. It is, however, the subject of proceedings before this Court. The United States has appealed from the district court's decision finding the State's plan in violation of Section 2, but failing to afford relief. *United States* v. *State of Florida*, No. 92-767 (jurisdictional statement filed Oct. 29, 1992). A group of private plaintiffs have also appealed the district court's decision regarding the redistricting plan for the state Senate. *De Grandy* v. *Wetherell*, No. 92-593 (jurisdictional statement filed Sept. 29, 1992).

United States, and with another redistricting suit that had been filed by the NAACP and a number of individual plaintiffs. J.S. App. 12a, 18a-20a.

On June 26, 1992, the three-judge court began conducting a trial on the merits. J.S. App. 23a. The court expedited the trial so that it could resolve the case before the upcoming primary elections.

2. On July 1, 1992, at the conclusion of trial, the district court ruled from the bench in favor of the plaintiffs. In an opinion issued on July 17, 1992, the court explained that ruling. J.S. App. 7a.

a. Applying the framework established by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), the district court first found that while the State's plan created nine districts in which Hispanics would constitute "voting majorities," J.S. App. 40a, Hispanics were sufficiently numerous and geographically compact to constitute voting majorities in two additional districts. J.S. App. 40a-41a. In reaching that conclusion, the court relied on a plan introduced by plaintiff De Grandy (the De Grandy plan), which contained 11 districts in which Hispanics constitute at lease 64% of the VAP. J.S. App. 68a.

The court recognized that, because a significant number of Hispanics are noncitizens, it could not infer that Hispanics constitute a voting majority in the De Grandy districts just because they constitute a majority of the population in those districts. J.S. App. 32a, 39a, 40a n.28. Rather, the court concluded that the De Grandy districts contain Hispanic voting majorities because (1) experience from other cases suggests that when Hispanics constitute a VAP supermajority, they are likely to constitute a voting majority; (2) actual election returns in Dade County showed that Hispanic-supported candidates would have won if they had run in the De Grandy districts;

and (3) none of the De Grandy districts has such a high concentration of recent immigrants as to call into question the conclusion that Hispanics constitute a voting majority. *Id.* at 32a-40a, 69a-70a.

The court found that the State's plan created nine rather than 11 Hispanic districts by fragmenting and packing the Hispanic population in Dade County. J.S. App. 43a. For example, the court found that one district line cut directly through the middle of an Hispanic neighborhood. *Ibid.* The court found that one district was packed with Hispanic voters "to protect a white incumbent" in a nearby district. *Ibid.* And the court found that the way the State plan drew the lines in two other districts "repeated the process of fragmenting Hispanic communities." *Ibid.*

The court found that the De Grandy alternative eliminated this fragmentation and packing without compromising neutral districting principles. In particular, the court found that the De Grandy districts are "relatively compact," regular in shape, and conducive to "effective representation." J.S. App. 43a-44a.

The court also found that Hispanics are politically cohesive. J.S. App. 44a-47a. The court found that there was a "high degree of political cohesiveness among Cuban voters," and "a sufficient degree of political cohesiveness among [all] Hispanics." *Id.* at 45a-47a.

The court also found that Hispanics had been victimized by bloc voting. In particular, it found that whites and African-Americans usually vote sufficiently as a bloc to defeat the candidates preferred by Hispanics unless those candidates run from districts in which Hispanics constitute a voting majority. *Id.* at 48a-52a

In addition, the court cited evidence that Dade County is "profoundly divided" by the competing interests of Hispanics, African-Americans, and whites, each having different social and economic interests. J.S. App. 50a. The tensions among the three groups, the court concluded, have caused "ethnic factors • • • [to] predominate over all other factors in Dade politics." *Id.* at 50a-51a. The court also found substantial evidence of discrimination against Hispanics. *Id.* at 51a-53a. Although "Cubans have fared relatively well in South Florida," the court found, "language based discrimination still exists." *Id.* at 53a-54a.

Based on those findings, the court concluded that "the 'totality of the circumstances' show[s] that • • • Hispanic vote dilution exists in Dade County under Florida's House plan." J.S. App. 30a.

b. Immediately after issuing its ruling on liability, the court conducted a remedial hearing. At the hearing, appellants offered a plan that had only ten Hispanic districts. The court rejected that plan because it did not fully remedy the violation. J.S. App. 69a. Appellants then offered a second plan. That plan had 11 districts in which Hispanics constituted a supermajority of the VAP, but two of the districts had high concentrations of recent immigrants and Hispanic VAPs of only 61%. *Ibid.* The court concluded that Hispanics would not constitute a voting majority in those two districts, and rejected appellants' second plan on that basis. *Id.* at 69a-70a.

The De Grandy plaintiffs presented a modified version of their original plan. J.S. App. 70a. Like the original, the modified De Grandy plan has 11 districts in which Hispanics constitute a voting majority. *Ibid.* The court found that this plan "merg[ed] the De Grandy remedy for South Florida into the

existing Florida plan." *Ibid.* The court noted that the plan made adjustments in the State's plan north of the Dade County area. *Ibid.* But it found that those changes were "minor" and that they were necessary to comply with one-person, one-vote requirements. *Id.* at 70a-71a. The State nonetheless objected to the modified De Grandy plan on the ground that it interferes with state policy choices outside Dade County.

In response, the United States suggested that the court begin with the 11 Hispanic districts from the original De Grandy plan and then allow the State to draw the remaining districts. VIII Tr. 141-142. Appellants rejected that proposal, however, VIII Tr. 141-144, and the court recessed. VIII Tr. 159. When the court returned, appellants announced that they would after all be willing to accept the United States' proposal, *ibid.* But the court announced that it had "done the best that we can with this case" and adopted the modified De Grandy plan. VIII Tr. 160. As the court explained in its opinion, the court concluded that the modified De Grandy plan "best remedies the dilution of the Hispanic vote in South Florida." J.S. App. 71a.

The court ordered that the 1992 elections be held under the modified De Grandy plan. J.S. App. 2a. It also ordered that the modified De Grandy plan be used for post-1992 elections. *Ibid.*

3. Judge Vinson filed a concurring opinion. He explained that appellants' estimates of Hispanic citizenship rates, which appellants used to argue that Hispanics did not constitute a majority of the eligible voters in some of the districts in the De Grandy plan, were "unreliable" and "must be viewed with low confidence and with a large range of error."

J.S. App. 74a. He added that appellees had used "a more relevant calculation * * * designed to account for, *inter alia*, citizenship" and also noted the significance of appellees' evidence that Hispanics could elect representatives of their choice in each of the 11 De Grandy districts. J.S. App. 75a.

With respect to the court's remedial determination, Judge Vinson explained that the court had examined the two remedial plans proposed by appellants but that "neither of [them] was even close to meeting Section 2's requirements * * * in accordance with [the] court's findings on liability." J.S. App. 75a. He noted that appellants had also been given the opportunity to "draw a plan that incorporated the De Grandy plan for Dade County into the rest of the state," but that appellants had refused to do so and that it was "apparent that [appellants] were intent on delaying the adoption of any plan that implemented a true eleven-Hispanic districts House plan for Dade County." J.S. App. 76a. He characterized as "too late" appellants' "belated change o[f] position and announcement," after the court had adopted the modified De Grandy plan, that they would be willing after all to draw a plan that incorporated the 11 De Grandy Hispanic districts. *Ibid.*

4. On July 16, 1992, this Court issued a stay of the district court's judgment pending the outcome of this appeal. J.S. App. 139a. The 1992 elections have now been held under the State's plan.

ARGUMENT

The district court's liability determination reflects a straightforward application of this Court's decision in *Gingles*. Accordingly, it should be summarily affirmed.

At the remedial stage of the proceedings, however, the district court did not conduct the kind of proceeding that generally ought to precede the imposition of a permanent court-ordered plan. Time constraints and appellants' failure to submit a bona fide remedial plan could have justified the court's decision to impose the modified De Grandy plan for the 1992 elections. Before imposing that plan for post-1992 elections, however, the district court should have given appellants a more complete opportunity to show that the modified De Grandy plan interferes with state policy more than necessary to remedy the violation. The court's order directing post-1992 elections to be held under the modified De Grandy plan should therefore be summarily vacated.

1. Appellants contend that the district court's liability determination is premised on the view that Section 2 requires a State to maximize a minority group's voting strength. J.S. 15-16. Appellants are mistaken. The district court's liability determination reflects a straightforward application of this Court's decision in *Gingles*.

a. In *Gingles*, this Court held that a minority group challenging a multimember district as a violation of Section 2 must show that (1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) "it is politically cohesive;" and (3) the "majority votes sufficiently as a bloc to enable it * * * usually to

defeat the minority's preferred candidate." 478 U.S. at 48-51. Once those preconditions have been established, a court must then consider other relevant factors to determine whether, under the totality of the circumstances, minority group members have been denied an equal opportunity to participate in the political process and to elect representatives of their choice. *Id.* at 77-80.

This Court did not decide in *Gingles* whether the same approach should govern challenges to single-member districts. 478 U.S. at 46-47 n.12. As we have argued in our brief amicus curiae in *Growe* v. *Emison*, No. 91-1420, at 8-12, however, plaintiffs alleging that single-member districts violate Section 2 are also subject to the requirements set forth in *Gingles*.

The district court carefully analyzed the *Gingles* preconditions here. It found that the State's plan fragmented and packed the Hispanic population and that, absent that fragmentation and packing, Hispanics are sufficiently numerous and geographically compact to constitute a majority in 2 additional single-member districts. J.S. App. 30a-44a. It found that Hispanics are politically cohesive. *Id.* at 44a-47a. And it found that non-Hispanics usually vote sufficiently as a bloc to defeat Hispanic-preferred candidates except when those candidates run in districts in which Hispanics constitute a voting majority. *Id.* at 48a-51a.

The court also cited evidence that Dade County is "profoundly divided" along racial and ethnic lines, that there are "tension[s]" among Hispanics, whites, and African-Americans, and that "ethnic factors * * * predominate over all other factors in Dade politics." J.S. App. 50a-51a. That evidence refutes

any suggestion that the observed bloc voting patterns are simply a response to particular candidates and that other candidates equally preferred by the minority might be able to attract the support of the majority. *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring in the judgment).

Finally, the court found substantial evidence of discrimination against Hispanics, including language-based employment discrimination. J.S. App. 53a. Such evidence is also 'supportive of" a finding of vote dilution (*Gingles*, 478 U.S. at 48-49 n.15, 80), because it "strengthen[s] a court's confidence that minority voters will be unable to overcome the relative disadvantage at which they are placed by a particular districting plan," and "suggest[s] a more general lack of opportunity to participate in the political process." *Id.* at 93 (O'Connor, J., concurring in the judgment).

Based on those findings, the district court concluded that plaintiffs had satisfied each of the *Gingles* preconditions and that the "totality of the circumstances" showed that the State's plan denied Hispanics an equal opportunity to participate in the political process and to elect representatives of their choice to the Florida House of Representatives. J.S. App. 30a. In short, the district court followed the approach set forth by this Court in *Gingles*.[2]

---

[2] As we noted in our brief amicus curiae in *Voinovich* v. *Quilter*, No. 91-1618, at 15 n.7, it may be that plaintiffs seeking to challenge the drawing of single-member districts must meet proof requirements beyond those applicable in the context of challenges to multimember districting schemes. The evidence before the district court was sufficient to meet any such higher evidentiary burden and, in any event, appellants do not challenge the district court's judgment on this ground.

b. Appellants' sole basis for their claim that the district court applied a maximization standard is that the court did not acept their proportional representation defense. J.S. 18-19. Appellants argue that they showed that the State's plan affords the Hispanic community proportional representation in Dade County because "nine of the 18 Dade County House districts will contain majority Hispanic voting age populations" and "50% of the voting age population of Dade County is Hispanic." J.S. 19. According to appellants, that constituted a complete defense to plaintiffs' Section 2 claim. We agree that persistent proportional representation is generally a defense to a Section 2 claim. See *Gingles*, 478 U.S. at 77 (Opinion of Brennan, J.); *id.* at 102 (O'Connor, J., concurring in the judgment). But appellants have selected the wrong frame of reference in mounting that defense.

The United States did not claim that the State's plan denied Hispanic voters *in Dade County* an equal opportunity to elect representatives of their choice to the Dade County local government. The United States claimed that the State's plan deprived Hispanics *in the State of Florida* of an equal opportunity to elect candidates of their choice to the state House of Representatives. App., *infra*, 5a. Appellants' showing that Hispanics are proportionally represented in Dade County is unresponsive to that claim. To mount a successful proportional representation defense to the United States' statewide claim, appellants would have to show that Hispanics throughout the State are proportionally represented in the Florida House.

It is true that the United States alleged in its complaint—and proved at trial—that the State could

have drawn two additional minority districts in the Dade County area. App., *infra*, 4a. But that did not transform the United States' statewide claim into a regional one. Rather, the premise of the United States' complaint was that to remedy dilution throughout the State, the State was required to draw minority districts where it could. The fact that Dade County is where such districts could be drawn does not change the fact that a defense based on proportionality must relate to the statewide discrimination charged.[3]

The situation is the same as that presented when plaintiffs challenge an at-large election system on the ground that it dilutes minority voting strength. To show that there is a remedy for such dilution, plaintiffs need only show that minorities are sufficiently concentrated in *one area* of the relevant political unit to constitute a voting majority in a single-member district. The drawing of a minority district in that area can remedy the dilution throughout the political unit, even though many minority voters may live outside the remedial district. See *McGhee* v. *Granville County*, 860 F.2d 110, 118-119 & n.9 (4th Cir. 1988); *Campos* v. *City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988), cert. denied, 492 U.S. 905

[3] Because Hispanics are most heavily concentrated in the Dade County area, much of the proof in this case—including proof of racially polarized voting—focused on the Dade County area. The evidence also makes clear, however, that voting is polarized along ethnic lines throughout the State, as one of appellants' own experts testified. See VI Tr. 246 ("generally speaking voting did tend to be polarized in Florida"); GX 13, at 4-5. Indeed, the State conceded that fact in proceedings in this same case before the same three-judge court regarding congressional redistricting. J.S. App. 79a.

(1989); *Gomez* v. *City of Watsonville*, 863 F.2d 1407, 1414 (9th Cir. 1988), cert. denied, 489 U.S. 1080 (1989).

Appellants' theory is fraught with theoretical and practical difficulties. For example, appellants offer no logical basis for selecting the geographic area in which proportional representation will provide a defense to a Section 2 claim. While appellants initially describe Dade County as the relevant geographic area, they later suggest that the "Dade County area" might be the relevant area. J.S. 4 n.11. With equal force, appellants could have defined a geographic area consisting of the nine Hispanic majority districts in the State's plan, all of which are contiguous. Appellants could have then argued that, in that area, Hispanics are far overrepresented since they constitute only approximately 72% of the population in those districts,[4] yet will apparently elect 100% of the representatives. If proof of that sort of "overrepresentation" were sufficient to defeat a Section 2 claim, defendants would apparently be able to defeat any such claim in which there is at least one majority minority district.

For those reasons, when plaintiffs make a statewide claim of vote dilution involving a legislative body with statewide jurisdiction, the relevant area for determining a proportional representation defense must be the entire State as well. Any other approach compares apples and oranges. The Florida House has 120 seats, and Hispanics constitute 11.7% of the State's VAP. J.S. App. 9a; GX 6, at 36. If a plan had been designed to afford Hispanics representation

[4] The figure of 72% is calculated by adding the Hispanic percentages of each of the nine districts as found by the district court, J.S. App. 67a, and dividing by nine.

in proportion to their voting age population, it would have 14 Hispanic seats (120 × 11.7% = 14). The State's plan, however, has only nine Hispanic seats. J.S. App. 67a. Appellants therefore have not shown that the State's plan provides statewide proportional representation.[5]

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[5] In mounting their proportional representation challenge in this Court, appellants rely upon figures concerning the proportion of the voting age population of Dade County that is Hispanic. See J.S. 18-19. They do not argue that *citizen* voting age population is the proper measure of proportional representation. Nor did they introduce evidence at trial on the statewide Hispanic citizen voting age population. Accordingly, this appeal does not raise any question concerning whether citizen voting age population is the proper measure of proportional representation.

It has come to our attention, from information supplied to us by the Census Bureau for purposes of certifications under Section 203 of the Voting Rights Act, 42 U.S.C. 1973aa-1a(b), unrelated to this case, that Hispanics constitute 7.15% of the citizen voting age population of Florida. Thus, if a plan had been designed to afford Hispanics representation in proportion to their numbers in the *citizen* voting age population, it would apparently have eight or nine Hispanic seats (120 × 7.15% = 8.58).

The Census Bureau figures are not in the record in this case, and therefore are not properly before this Court. But, as we argue below, pp. 19-20, *infra*, this case should be remanded to the district court in any event. At that point, should appellants attempt to rely on these figures, the district court would have to decide in the first instance whether the evidence may be considered and whether it should result in any modification of the judgment. Among other things, the district court may consider (1) whether appellants have waived any proportional representation defense based on citizen voting age population, (2) whether appellants could have discovered this evidence through due diligence, (3) whether citizen voting age population, voting age population, or total population is the proper measure of proportional representation, and (4) whether the facts of this case compel a finding of a Section 2 violation, even if there is proof of statewide proportional representation, see *Gingles*, 478 U.S. at 102 (O'Connor, J., concurring in the judgment). We do not believe that these issues are properly framed for consideration by this Court at this point.

2. Appellants next argue (J.S. 21-25) that the district court applied an improper legal standard in finding that Hispanics constitute a majority in the 11 De Grandy districts. According to appellants, the district court relied solely on the fact that Hispanics constitute a VAP majority in these districts, failing to take into account that a substantial number of Hispanics are noncitizens. When noncitizens are factored out, appellants contend, Hispanics constitute a majority in only three of the De Grandy districts. J.S. 22 & n.43. Appellants have mischaracterized the district court's approach to this issue.

The district court did not simply find that Hispanics constitute a VAP majority in the 11 De Grandy districts. It found that Hispanics constitute a "voting majorit[y]" in those districts. J.S. App. 40a. The court used that phrase to refer to a majority of the eligible voters—*i.e.*, citizen voting age population—as demonstrated by the court's express statement that its calculation of the Hispanic composition of the districts "account[ed] for citizenship." *Id.* at 40a & n.28; see also *id.* at 74a-75a (Vinson, J., concurring). Accordingly, while appellants try to frame the issue differently, the real question is whether the district court's finding that Hispanics constitute a voting majority in the 11 De Grandy districts was clearly erroneous. In our view, it was not.

In resolving this issue, the district court first took into account experience from other cases indicating that when Hispanics constitute more than 60% of the VAP, they are likely to constitute a voting majority. J.S. App. 31a-32a, 39a-40a & n.28. Because all the De Grandy districts are over 60% Hispanic in VAP, that experience is relevant here. In fact, all the De Grandy districts are over 64% Hispanic in VAP. That makes it even more likely that Hispanics constitute a voting majority in those districts. Cf. *Brewer* v. *Ham*, 876 F.2d 448, 452 (5th Cir. 1989) (evidence that blacks constitute a supermajority of the total population is sufficient to show that they constitute a voting majority).

Second, the district court considered actual election returns showing that Hispanic-preferred candidates would have won if they had run in the De Grandy districts. J.S. App. 36a-37a. Because voting in Dade County is highly polarized, such evidence further supports the conclusion that Hispanics constitute a voting majority in those districts. *Westwego Citizens For Better Gov't* v. *City of Westwego*, 906 F.2d 1042, 1046-1047 (5th Cir. 1990).

Finally, the district court carefully examined evidence about where citizens and noncitizens are most heavily concentrated in Dade County. J.S. App. 38a, 57a, 58a n.46, 69a-70a. The court satisfied itself that none of the De Grandy districts has such a high concentration of recent immigrants as to call into question the conclusion that Hispanics constitute a voting majority.

Appellants contend (J.S. 23-24) that the district court applied an unbending 60% rule, automatically assuming that if Hispanics constitute over 60% of the VAP in a district, they necessarily constitute a

voting majority. But as the discussion above demonstrates, the court did no such thing. While the court used the 60% VAP figure as one factor in its analysis, it also relied on evidence that the De Grandy districts are all over 64% Hispanic in VAP, that Hispanic preferred candidates would have won if they had run in the De Grandy districts, and that none of the De Grandy districts has an overly high concentration of noncitizens.[6]

Appellants also argue (J.S. 25) that the district court erred in failing to credit their expert's opinion that Hispanics constitute a voting majority in only three of the 11 De Grandy districts. Their expert's opinion should have been treated as conclusive, appellants contend, because it was based on "actual data." *Ibid.*

Appellants' expert did not, however, produce actual data on the percentage of Hispanics eligible to vote in each De Grandy district. Such data were not available. See J.S. App. 74a (Vinson, J., concurring). Appellants' expert began with the overall citizenship rate in Dade County, which he got from the Census; he then performed a regression analysis to

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[6] The district court's rejection of appellants' remedial plan illustrates the district court's flexible, fact-intensive approach. Appellants' second proposed remedial plan had 11 districts in which Hispanics constituted over 60% of the VAP. J.S. App. 69a. Because two of those districts were only 61% Hispanic in VAP and because they contained high concentrations of recent immigrants, however, the court determined that Hispanics would not constitute a voting majority in those two districts. *Id.* at 69a-70a. That conclusion demonstrates that the district court was aware that the relevant inquiry was not merely whether Hispanics constituted a majority of the VAP in the districts at issue, but rather whether Hispanics constituted a majority of the eligible voters in those districts.

estimate the percentage of Hispanic and non-Hispanic citizens in Dade County; and he then used those county-wide figures to estimate the Hispanic citizen VAP in each De Grandy district. *Ibid.* Accordingly, what appellants refer to as "actual data" are really estimates derived from estimates.

In addition, the analysis performed by appellants' expert was seriously flawed. It relied upon a county-wide Hispanic citizenship rate that was subject to a high rate of error. See J.S. App. 74a (Vinson, J., concurring). It did not attempt to deal with possible variations at the district level. J.S. App. 38a n.26. And it took no account of other evidence in the record. In particular, it posited that districts in which Hispanics constitute 66% of the VAP are under 50% Hispanic in eligible voters (*id.* at 38a), even though election returns establish that any district over 65% Hispanic in VAP is a "safe" Hispanic seat. *Id.* at 37a; see generally *id.* at 74a-75a (Vinson, J., concurring). Given those deficiencies, the district court understandably concluded that appellants' evidence could not overcome plaintiffs' showing that Hispanics constitute a voting majority in the 11 De Grandy districts.

3. Appellants argue (J.S. 25-27) that the district court abused its discretion in imposing the modified De Grandy remedial plan. Appellants challenge that remedial decision on several grounds.

Appellants first assert (J.S. 26) that the district court did not give them an opportunity to introduce their own remedial plan. That assertion is inaccurate. The district court permitted appellants to introduce two remedial plans. J.S. App. 68a-69a. Appellants do not take issue with the district court's

conclusion (*id.* at 68a-70a) that neither of those plans came close to remedying the proven violation.

Appellants next contend (J.S. 26-27) that the court's remedial plan interferes with state policy more than necessary to remedy the violation. In particular, appellants assert that the court's remedial plan deviates from the State's plan in areas outside of Dade County. But the district court found that those adjustments were minimal and necessary to comply with one-person, one-vote requirements. J.S. App. 70a-71a. Appellants have not shown that those findings are clearly erroneous.

Appellants nonetheless argue with considerable force that the district court's remedial proceeding did not afford them an adequate opportunity to show that the modified De Grandy plan needlessly disrupts state policy outside Dade County. J.S. 27. Specifically, they point out that they did not receive the modified De Grandy plan until the beginning of the remedial hearing, that the proponent of the plan addressed the court not as a witness, but in a narrative fashion from the podium, and that they had no opportunity to cross-examine him. *Ibid.*

We agree with appellants that the district court did not conduct the kind of remedial proceeding that should precede the adoption of a permanent remedial plan. On the other hand, the district court had to act quickly so that it could afford relief in time for the upcoming elections. Moreover, appellants complicated the district court's task when they introduced two remedial plans that failed to remedy the violation and then refused to accept (until after the court had reached its decision) another alternative proposed by the United States, under which they would have drawn a new plan incorporating the 11 De

Grandy Hispanic districts into the rest of the State as they saw fit. In those circumstances, the district court did not abuse its discretion in imposing the modified De Grandy plan for the 1992 elections. See *Upham* v. *Seamon*, 456 U.S. 37, 44 (1982) (when elections are imminent, district court has authority to order elections to be held in accord with plans "that do not in all respects measure up to legal requirements").

The district court did not, however, simply impose the modified De Grandy plan for the 1992 elections. It also imposed that plan for post-1992 elections as well. There is no justification for the district court's decision to take that action without first conducting a more complete and less hurried proceeding to determine whether the modified De Grandy plan disrupts state policy more than necessary to remedy the violation. Accordingly, to the extent that the district court's order imposes the modified De Grandy plan for post-1992 elections, it should be summarily vacated and the case should be remanded for further remedial proceedings.

4. Finally, appellants contend (J.S. 28-29) that the district court should have abstained from deciding the De Grandy plaintiffs' Section 2 claim because of the pendency of a state court suit in which the De Grandy plaintiffs asserted a Section 2 claim. According to appellants, this Court's decision in *Younger* v. *Harris*, 401 U.S. 37, 44 (1971), compels such absention.

Appellants do not present to this Court a claim that the district court should have abstained from adjudicating the Section 2 claims *of the United States* in this case. Their fourth question presented asks whether abstention is necessary "when the plaintiffs seeking federal court relief have previously raised,

and demanded and received adjudication of, identical claims in an ongoing state court proceeding." J.S. i. The United States was not a party to the state court proceeding—a fact that appellants never mention—and certainly never "raised, and demanded and received adjudication of" its federal claims in that proceeding. *Ibid.* Appellants thus do not present to this Court any claim that the district court should have abstained from deciding the Section 2 claims of the United States.[7]

Nor does anything in appellants' discussion of the abstention issue suggest that the scope of their questions presented should be broadened. Appellants correctly state that "[t]he district court declined to abstain from deciding *plaintiffs'* Section 2 challenges." J.S. 28 (emphasis added). But their entire argument that the district court's decision was wrong —or even that it raises any substantial question—specifically concerns the court's refusal to abstain from adjudicating the De Grandy plaintiffs' Section 2 claims. See *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 928-929 (1975). Their argument is based entirely on actions allegedly taken by the De Grandy plaintiffs—not the United States—in a prior state court proceeding.[8] J.S. 28-29. And appellants conclude their dis-

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[7] Under Rule 18.3 of the Rules of this Court, "[t]he jurisdictional statement shall follow, insofar as applicable, the form for a petition for a writ of certiorari prescribed by Rule 14." Rule 14.1(a) provides that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by th[is] Court."

[8] In light of the fact that a final judgment had been issued by the Florida Supreme Court (J.S. App. 104a-138a) at the time that the trial in this case commenced, the doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971), would in any event

cussion by referring to the State's interest in "adjudicating the Voting Rights Act challenges * * * raised by the De Grandy plaintiffs," J.S. 29—not those of the United States.

In any event, Congress gave the United States authority to bring a civil action to enforce Section 2 of the Voting Rights Act, see 42 U.S.C. 1973j(d), and gave the federal district courts jurisdiction over such an action, 42 U.S.C. 1973j(f). In doing so, Congress made clear that the United States could not be required to exhaust state remedies before bringing a federal claim. See 42 U.S.C. 1973j(f) (district courts of the United States * * * shall exercise [jurisdiction over Section 2 claims brought by the United States] without regard to whether a person asserting rights under [Section 2] shall have exhausted any administrative or other remedies that may be provided by law"). Accordingly, even if appellants were correct in claiming that the district court should have abstained from adjudicating the De Grandy plaintiff's Section 2 claim, the abstention doctrine did not require the district court to abstain

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have little impact on the ability of the district court to adjudicate this case. The preclusive effect of the final state court judgment should instead be measured by principles of *res judicata* as incorporated in 28 U.S.C. 1738, not by the abstention doctrine. We note that even a party is not bound by the judgment in a proceeding unless he has had a full and fair opportunity to litigate the claim resolved by the judgment. See *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 480-482 & n.22 (1982); *Allen* v. *McCurry*, 449 U.S. 90, 95 & n.7 (1980). It may be doubted whether the De Grandy plaintiffs had such an opportunity in the Florida Supreme Court, which noted "the limitations of [its] review, including both time constraints and the unavailabiilty of specific factual findings." J.S. App. 119a.

from deciding the United States' Section 2 claim as well.

CONCLUSION

The district court's finding of liability should be summarily affirmed. The district court's remedial order should be summarily vacated, and the case should be remanded for a remedial hearing aimed at determining the proper remedy for post-1992 elections.

Respectfully submitted.

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NOVEMBER 1992

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

C.A. No. 92-40220 MP

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF FLORIDA, a State of the United States; T.K. WETHERELL, Speaker of the Florida House of Representatives; GWEN MARGOLIS, President of the Florida Senate; LAWTON CHILES, Governor of the State of Florida; ROBERT BUTTERWORTH, Attorney General for the State of Florida; PETER R. WALLACE, Chairman of the House Reapportionment Committee; JACK GORDON, Chairman of the Senate Reapportionment Committee; JIM SMITH, Secretary of State for the State of Florida, DEFENDANTS

COMPLAINT

[Filed Jun. 23, 1992]

The United States of America alleges that:

1. This is a complaint brought on behalf of the United States of America pursuant to 42 U.S.C. 1973, 42 U.S.C. 1973c, 42 U.S.C. 1973j(d), and 28 U.S.C. 2201, to enforce rights guaranteed by the Fourteenth and Fifteenth Amendments to the United States Constitution.

2. This Court has jurisdiction of this action pursuant to 28 U.S.C. 1345 and 42 U.S.C. 1973j(f).

3. Defendants are the State of Florida and officials thereof who have duties and responsibilities under the laws of that state to reapportion the Florida Legislature. Defendant T.K. Wetherell is Speaker of the Florida House of Representatives. Defendant Gwen Margolis is President of the Florida Senate. Defendant Lawton Chiles is Governor of the State of Florida. Defendant Robert Butterworth is the Attorney General for the State of Florida. Defendant Peter R. Wallace is Chairman of the House Reapportionment Committee. Defendant Jack Gordon is Chairman of the Senate Reapportionment Committee. Defendant Jim Smith is Secretary of State for the State of Florida and is responsible under the laws of that state to oversee the conduct of elections. All defendants are sued in their official capacities.

4. The Florida Legislature is comprised of a 120-member House of Representatives and a 40-member State Senate. Members of the House are elected concurrently to two-year terms. Members of the Senate are elected to four-year terms. However, terms of office for members of the Florida Senate are staggered such that half of the Senate runs for a two-year term and half of the Senate runs for a four-year term at the next election following a reapportionment, such as 1992. Members of the Florida House and Florida Senate are elected from single-member districts.

5. The State of Florida has experienced a significant increase in the number and percentage of Hispanic residents during the period from 1980 to 1990. According to the 1980 Census, the population of the State was 9,746,324, of whom 858,158 (8.80%) were Hispanic. According to the 1990 Census, the State's population has grown to 12,973,926, of whom 1,574,143 (12.17%) are Hispanics. In Dade County, the Hispanic population has grown from 580,994 in 1980 to 953,407 in 1990—an increase from 1980 of 64.1 percent. More than 60 percent of the State's Hispanic population resides in Dade County.

6. At the time of the planning for the redistricting on the basis of the 1990 Census, the defendants and members of the Florida Legislature were aware of the significant increase in Hispanic population that had occurred during the period from 1980 to 1990.

7. The Florida State Legislature passed a reapportionment plan ("SJR 2-G") to elect the members of the State Legislature on April 10, 1992. On May 13, 1992, the Florida Supreme Court issued a declaratory judgment determining the validity of SJR 2-G reapportioning the legislature of the State of Florida.

COUNT I

8. The redistricting plans for the members of the Florida Legislature dilute the voting strength of black citizens and Hispanic citizens in several areas of the State, including the following areas:

Dade County

a. In Dade County, Hispanic persons comprise a slight majority (50.5%) of the voting age population. The redistricting plan enacted by the State of Florida for the *House of Representatives* creates 20 districts in the Dade County area. The State's House plan fragments the Hispanic population concentrations such that Hispanics constitute a majority of the voting age population in only nine (9) districts;

b. With respect to the State *Senate* plan, the redistricting plan enacted by the State of Florida creates seven (7) districts in the Dade County area. The State's proposed Senate plan fragments the Hispanic population concentrations such that Hispanics comprise a majority of the voting age population only in three (3) districts;

c. The racial and ethnic population concentrations existing in the Dade County area are such that, if the Dade County area of the State is divided into equally populated legislative districts which respect communities of interests and follow other nondiscriminatory plan-drawing criteria, Hispanics would constitute a significant voting-age majority of the population in two additional districts in the House of Representatives, and one additional district in the Senate.

Escambia County

d. In the Pensacola-Escambia County area of the State, the redistricting plan enacted by the State of Florida for its House of Representatives divides Escambia County into four (4) House districts. The State's House plan fragments the black population in this area among several districts such that blacks comprise less than 26 percent of the voting age population in each of these four districts. Alternative plans have been developed which unite the black population concentrations in Pensacola-Escambia County into one district in which black citizens would have a meaningful opportunity to effect elections for the House of Representatives.

9. Elections in the State of Florida, including elections for positions in the State Legislature, are characterized by patterns of racial and ethnic bloc voting.

a. Hispanics are politically cohesive. Hispanic candidates for public office generally receive substantial support from Hispanic voters, but such candidates often are not successful in obtaining election because of a lack of support from other voters.

b. Blacks are politically cohesive. Black candidates for public office generally receive substantial support from black voters, but such candidates often are not successful in obtaining elections because of a lack of support from other voters.

10. Blacks and Hispanics in Florida have, historically, been the victims of official discrimination perpetrated by the State of Florida and local governments therein. Such discrimination has included discrimination touching on the right of black citizens and the Spanish-speaking and other language minorities to register, vote and participate in the political process.

11. Socioeconomic statistics demonstrate that blacks and Hispanics in Florida continue to bear the effects of discrimination in such areas as education, employment, income, health and housing. The depressed socioeconomic status of blacks and Hispanics in the State of Florida has a disparate and injurious effect on the ability of black and Hispanic citizens to participate equally in the political process and to have an equal opportunity to elect a candidate of their choice to the State Legislature.

12. Under the totality of circumstances, and in the context of the factual circumstances described in paragraphs 4 to 14, *supra*, the redistricting plans for the Florida House of Representatives and the Florida State Senate deprive Hispanic citizens and black citizens in the State of Florida of an equal opportunity to participate in the political process and to elect candidates of their choice to the State Legislature.

COUNT II

13. The United States realleges the facts set out in paragraphs 4 through 12, above.

14. The State's proposed Senate plan in the Hillsborough County area divided the politically cohesive minority populations in the Tampa and St. Petersburg areas

such that there were no senatorial districts in which minority persons constituted a majority of the voting age population. On June 16, 1992, the Attorney General interposed a timely objection to the Senate plan pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. The Senate plan is legally unenforceable. Alternative plans for the State Senate are available which remedy the Section 5 objection interposed by the Attorney General. These alternative plans unite the minority populations in Tampa and St. Petersburg to provide minority voters an effective opportunity to elect their preferred candidate to the State Senate.

15. With regard to both Counts I & II, unless enjoined by this Court, the defendants will fail to devise, and implement in 1992, plans for their State House and Senate plan which meet the requirements of federal law.

WHEREFORE, the United States prays that a three-judge Court be convened pursuant to 28 U.S.C. 2284 and 42 U.S.C. 1973c, and thereafter enter a judgment:

(a) Declaring that the redistricting plans for the Florida House of Representatives and the Florida Senate constitute voting standards, practices, or procedures within the meaning of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and that those redistricting plans violate Section 2;

(b) Declaring that the redistricting plan for the Florida State Senate is a standard, practice, or procedure with respect to voting within the meaning of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, and that the plan has failed to satisfy the preclearance requirements of Section 5;

(c) Enjoining defendants, their agents and successors in office, and all persons acting in concert with them from administering, implementing or conducting any election for members of the Flor-

ida House of Representatives and the Florida State Senate pursuant to the statutorily invalid plans; and

(d) Ordering defendants to devise new plans for the election of the Florida House and Florida Senate that meet the requirements of federal law. If the defendants fail to devise such plans, the Court should order plans into effect.

Plaintiff further prays that the Court grant such additional relief as the interests of justice may require, together with the costs and disbursements of this action.

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No. 92-519 and 92-767

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In The Supreme Court Of The United States

OCTOBER TERM, 1992

T.K. WETHERELL, et al., *Appellants*,
v.
MIGUEL DeGRANDY, et al., *Appellees*.

UNITED STATES OF AMERICA, et al., *Appellants*,
v.
STATE OF FLORIDA, et al., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

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QUESTIONS PRESENTED

Upon a trial under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, the three-judge district court imposed a remedial districting plan for the Florida State House of Representatives. The questions presented are:

1. Whether the district court erred in rejecting the State's apportionment plan in which minority districts were not apportioned on the basis of total minority population.

2. Whether a substantial issue is presented for review when the district court, after a full review of evidence pertaining to the preconditions and the totality of the circumstances test under Thornburg v. Gingles, 478 U.S. 30 (1986), imposes a remedy which takes into account minority voting effectiveness.

3. Whether the abstention doctrine bars plaintiffs from asserting claims under the Voting Rights Act when no state court was pending and no state court has adjudicated those claims.

4. Whether the district court erred in imposing a remedial plan when the 1992 election was imminent and the State had failed to offer a plan which fully remedied the dilution of the Hispanic vote in south Florida.

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In The
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T.K. WETHERELL, et al., Appellants,
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STATE OF FLORIDA, et al., Appellees.

On Appeal From The United States District Court
For The Northern District Of Florida
Tallahassee Division

MOTION TO DISMISS OR AFFIRM

INTRODUCTION

This case was brought under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The three-judge district court reviewed extensive testimony concerning voting history, electoral success and other factors included in the "totality of the circumstances" test and properly applied the vote dilution analysis established by this Court in Thornburg v. Gingles, 478 U.S. 30 (1986). With elections imminent, the court imposed a remedial plan for the Florida House of Representatives.

The Appellants do not challenge the lower court's findings regarding minority group cohesiveness or racially polarized voting -- two of the three threshold findings necessary to establish Section 2 liability. Rather, they question only the lower court's finding that the Hispanic population in south Florida is sufficiently large to constitute an effective voting majority in eleven state House Districts, as opposed to the nine established by Appellants' plan.

Additionally, the Appellants seek to avoid the consequences of the lower court's Section 2 liability findings by arguing (1) that the Appellees' federal rights should have been adjudicated in another forum, (2) that there were procedural defects in the remedial phase of the hearing, and (3) that a "proportional" allocation of House seats (based on citizen voting age population, rather than total population, in Dade County) provides an affirmative defense in a Section 2 case. These arguments present no substantial questions and, no "clearly erroneous" findings having been identified,[1] plenary consideration by this Court is unwarranted. This appeal should, therefore, be summarily dismissed or affirmed, and the lower court's remedial order apportioning the Florida House of Representatives should be implemented.[2]

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[1] In Gingles, this Court "reaffirm[ed] our view that the clearly erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution." 478 U.S. at 79.

[2] By way of this Motion to Dismiss or Affirm, the DeGrandy Appellees also respond to the Jurisdictional Statement of the United States in United States v. State of Florida, No. 92-767. Except as otherwise noted, the DeGrandy Appellees concur with the presentation of issues by the United States in its Jurisdictional Statement.

STATEMENT OF THE CASE

A. The State Reapportionment Process.

Florida's Constitution establishes a unique role for its Supreme Court in the reapportionment[3] process. That constitution directs the state legislature to reapportion Florida's congressional delegation and the state House of Representatives and Senate and establishes a process to achieve that result.[4] Fla. Const. art. III, § 16. If the legislature fails to pass a joint resolution of state legislative apportionment in regular session, it must meet in special session. Failing passage of a plan in special session, the Florida Supreme Court must assume a legislative role and adopt its own plan. Fla. Const. art. III, § 16(f).

If the Legislature does pass a joint resolution of apportionment, the enactment process requires that joint resolution to be submitted to the Florida Supreme Court for a special 30-day review.[5] The court does not resolve dis-

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[3] Although "reapportionment" technically refers to the process of distributing seats in the United States House of Representatives among the states, the Florida Constitution uses the word "apportionment" to describe its process of determining the number of legislative seats and establishing district lines. The court below used the term "reapportionment." This Motion adopts the terminology of the court below.

[4] The Florida Legislature failed to adopt a plan for congressional reapportionment, forcing the federal court to devise a plan which was adopted and implemented in the 1992 elections. The congressional plan has not been appealed. See DeGrandy v. Wetherell, 794 F. Supp. 1076 (N.D. Fla. 1992).

[5] The 30-day review is designated as a "declaratory judgment," but no evidence is taken, no cross-examination is permitted and the merits are decided solely on the basis of briefs and oral argument. As a

puted issues of fact or make factual findings. In prior reapportionment cases, the Florida Supreme Court has established that challenges to an apportionment plan under Section 2 of the Voting Rights Act must be conducted in separate trial proceedings. In re Apportionment Law, Senate Joint Resolution No. 1305, 263 So. 2d 797, 808 (Fla. 1982). Once the court has conducted its facial, 30-day review and held the plan valid, the plan becomes effective under state law.[6]

B. The Federal Lawsuit.

On January 13, 1992 -- three months prior to any state proceedings -- the Appellees filed suit in the United States District Court for the Northern District of Florida. App. 9a.[7] Appellees' original claim alleged that the Florida Legislature would not pass a legislative plan meeting all constitutional and statutory requirements sufficiently in advance of the 1992 elections to afford Appellees the opportunity to participate fully in those elections and to mount effective campaigns.[8] Accordingly, Appellees requested that the federal court accept jurisdiction, establish a scheduling order and, thereafter, if necessary, prepare congressional and state legislative plans of apportionment that would become effective in June, 1992. Appellees did not request the federal court to enjoin the state legislature's effort to pass apportionment plans. Rather, Appellees requested that the federal court permit the legislature to proceed, but simultaneously to develop reapportionment plans in the event that the legislative process did not produce acceptable plans sufficiently in advance of the qualifying date for the 1992 elections. The federal court dismissed Appellees' original complaint without prejudice, deferring to the legislative process and to the Appellants' assertions that congressional and legislative plans would be adopted and in place well in advance of the qualifying deadline. App. 10a.

The regular session of the state Legislature ended in March 1992, without passage of any apportionment plan. App. 12a. As a result, Appellees filed their second amended complaint, renewing their request that the federal court take jurisdiction and ensure that some apportionment plan, whether legislative or court-ordered, be in place in advance of the 1992 elections.[9] The court denied Appellants' renewed motions to dismiss, accepted jurisdiction, and established a scheduling order whereby congressional and legislative plans would be submitted by May 29, 1992. App. 12a. In entering the scheduling order, the three-judge

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result, this state court process is referred to as a "facial review." In re Apportionment Law, Senate Joint Resolution No. 1305, 263 So. 2d 797, 808 (Fla. 1982). Unlike every other Florida law, state legislative reapportionment is not subject to a gubernatorial veto. See Fla. Const. art. III, § 16.

[6] Upon conclusion of the state court review, the plan is subject to preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c) and 28 C.F.R. § 51.1, et seq. Accordingly, the State of Florida did not submit the plan for preclearance until after the review by the Florida Supreme Court.

[7] "App." references are made to the Appellants' Appendix.

[8] The DeGrandy Appellees are comprised of African-American, Hispanic and Anglo voters, legislators and prospective candidates for office who reside throughout the state.

[9] The Second Amended Complaint contained claims under Section 2 and the Fourteenth Amendment. App. 10a.

District Court announced that it was not enjoining any state proceedings or any effort by the state legislature to adopt apportionment plans. Id.

Two weeks after acceptance of jurisdiction by the federal court, the Florida Legislature passed Senate Joint Resolution 2-G, reapportioning the state House of Representatives and the state Senate. Id. No congressional plan was passed. The federal court immediately delayed trial on state apportionment but maintained its schedule with respect to congressional redistricting. Id. On April 10, the Florida Supreme Court began its review of the Joint Resolution in accordance with the Florida constitutional provision. On May 13, 1992, the state supreme court declared the Joint Resolution "facially valid." App. 13a. On the same day, the federal court, in deference to the state court action, stayed all its proceedings concerning state legislative apportionment pending Section 5 preclearance. Id.

C. State Judicial Review Of The Joint Resolution.

During the state judicial review, both houses of the legislature contended that the Florida Supreme Court could not determine whether the legislative plan complied with Section 2 of the Voting Rights Act. The joint brief of the legislature argued:

> This Court's instant review cannot be dispositive of the ultimate Section 2 determination. Section 2 requires an "intensely local appraisal of the design and impact mechanism" and a "flexible, fact-intensive inquiry into the past and present reality of the political process" . . . an inquiry beyond the

> scope of this Court's Article III, Section 16 review.

Joint Brief of Legislature at 17.

The Florida Attorney General took the same position:

> A Section 2 challenge requires a detailed, complex factual inquiry into the underlying application of the redistricting plan. The question of whether the political processes are equally open depends on a searching and practical evaluation of the past and present reality and on a functional view of the political process. This determination is peculiarly dependent upon the facts of such case . . . A Section 2 claim for the purposes of this Court's jurisdiction is not a facial constitutional claim; therefore, any Section 2 implication is not properly before this Court in this proceeding.

Brief of Attorney General at 25.

In contrast, the Appellees urged the Florida Supreme Court to conduct a complete trial -- with testimony under oath and subject to cross examination -- to determine whether the Joint Resolution violated Section 2. Appellees also asserted that any attempt to determine the plan's compliance with the Voting Rights Act without evidentiary proceedings would be unconstitutional. Brief of DeGrandy at 9.

The Florida Supreme Court rejected the Appellees' request for an adjudication of their Section 2 claims, holding:

> It is impossible for us to conduct the complete factual analysis contemplated by the Voting Rights Act, as interpreted in Thornburg v. Gingles, within the time constraints of Article III, Section 16(c).

In re Senate Joint Resolution 2-G, 597 So. 2d 276, 282 (Fla. 1992). Because necessary fact-finding and factual analysis was impossible, the Court held that a Section 2 challenge would have to come at a later time:

> Any decision which requires consideration of facts that are unavailable in our analysis will have to be resolved in subsequent litigation . . .

Id. at 282. Thus, the Florida Supreme Court's conclusion that the Joint Resolution does not discriminate against minorities was expressly qualified by "the limitations of [its] review, including both time constraints and the unavailability of specific factual findings. . . ." Id. at 285. Accordingly, the court entered its decision without prejudice to a future Section 2 challenge:

> We acknowledge that any interested person should have the opportunity to attempt to prove that the Joint Resolution is invalid through a presentation of evidence in accordance with the Gingles analysis of the Voting Rights Act. Therefore, our holding is without prejudice to the right of any protestor to question the validity of the plan by filing a petition in this Court alleging how the plan violates the Voting Rights Act.

Id. at 285-86.[10]

On April 6, 1992, pursuant to Fed. R. Civ. P. 53, the federal court appointed a Special Master to prepare or review plans for congressional and legislative reapportionment. App. 12a. On April 24, 1992, the Special Master appointed an expert to consider and evaluate the parties' congressional plans and began hearings on them. The evidence adduced at the hearings on congressional redistricting was extensive and largely concerned Section 2 evidentiary issues regarding the "totality of the circumstances" test, including, specifically, south Florida.[11] Thus, when the Florida Supreme Court entered its decision on May 13, the federal court had in place all machinery necessary to review the parties' proposed plans and, if necessary, to prepare court-drawn congressional and state legislative apportionment plans.

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[10] The Florida Supreme Court has at no time, either in its May 13 decision or thereafter, entered findings of fact concerning the standards applicable to a Section 2 claim under the Voting Rights Act. No subsequent state court action challenging the Joint Resolution under Section 2 of the Voting Rights Act has been brought.

[11] For a discussion of the evidentiary basis upon which the Special Master concluded that minority congressional districts would be necessary, see DeGrandy v. Wetherell, 794 F. Supp. 1076, 1078 (N.D. Fla. 1992). The findings regarding the "totality of the circumstances" elements in Dade County have been buttressed recently in Meek v. Metropolitan Dade County, Fla., No. 86-1820-Civ-Graham, 1992 WL 174506 (S.D. Fla., May 26, 1992), Meek v. Metropolitan Dade County, Fla., No. 86-1820-Civ, 1992 WL 259754 (S.D. Fla, Sept. 11, 1992).

D. Federal Court Proceedings – Section 2 Challenges To The Legislative Plan After Preclearance.

After the United States Attorney General precleared Florida's plan for the state House,[12] the DeGrandy Appellees moved, and were granted leave, to amend their complaint to include a Section 2 challenge to the precleared plan.[13] App. 14a-15a. On June 24, 1992, the Department of Justice filed a separate complaint challenging both the state House and state Senate plans under Section 2 of the Voting Rights Act. That action was consolidated with the amended DeGrandy complaint.

On June 26, 1992, the Florida Supreme Court modified the Florida Senate plan to meet the objections interposed by the Department of Justice and it became legally enforceable under state law. The appellees were allowed by the court to amend their complaint to add Section 2 challenges to the Florida Senate plan. App. 18a-19a.

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[12] Dade County is not subject to Section 5 of the Voting Rights Act. Only five Florida counties are Collier, Hardee, Hendry, Hillsborough, and Monroe. 28 C.F.R. § 51, App.

[13] Despite the Florida Supreme Court's "facial review" of SJR 2-G and its determination that the plan "does not discriminate against minorities," the Department of Justice refused to preclear Florida's Senate plan under Section 5 of the Voting Rights Act. Under federal law, Florida's 1990 apportionment was "not effective as law until and unless it is precleared." McCain v. Lybrand, 465 U.S. 236 (1984).

E. The Section 2 Trial.

The three-judge court below divided the Section 2 trial regarding the legislative plan into a liability phase followed by a remedial phase. At the liability phase, the lower court determined that the Appellees had met all three of the Gingles preconditions,[14] as well as the totality of the circumstances test outlined by Gingles, and had established Section 2 liability.[15] App. 24a; App. 30a-55a.

In reaching its decision that the Hispanic community was sufficiently large to comprise a tenth and an eleventh House district, the court carefully examined the testimony of numerous experts regarding the percentage of voting age population necessary for Hispanics to have an equal opportunity to elect candidates of their choice. The court also examined the available evidence to locate within Dade County the residences of recent immigrants. App. 38a. The court concluded that, applying a 60% Hispanic voting age population ("VAP") guideline to localized demographic areas, this percentage concentration would allow for diminished citizenship levels as well as lower turnout and regis-

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[14] The only precondition the Appellants challenge here is whether the Appellees proved that the Hispanic population group is sufficiently large to constitute a majority in two additional single-member state house districts.

[15] In Solomon v. Liberty County, Florida, 899 F.2d 1012 (11th Cir. 1990) (en banc) cert. denied, ___ U.S. ___, 111 S. Ct. 670 (1991), the Eleventh Circuit Court of Appeals divided evenly on the issue of whether Section 2 plaintiffs must make a showing beyond the three Gingles factors to establish liability. In the present case, the court below examined the "totality of the circumstances" in addition to the Gingles factors and concluded that under either analysis the Appellees had met their burden of establishing liability. App. 30a.

tration levels and would provide an appropriate opportunity for minority citi-zens to elect candidates of their choice.[16]

ARGUMENT

I. THE APPELLANTS' ASSERTION THAT THE STATE'S REAPPORTIONMENT PLAN ACHIEVES PROPORTIONALITY IS UNSUPPORTED BY THE RECORD.

The Appellants' instant affirmative defense of proportional representation was not pled by them pursuant to Fed. R. Civ. P. 8(c) and cannot be raised for the first time on appeal. Henry v. First Nat'l Bank of Clarksdale, 595 F.2d 291, 298 (5th Cir. 1979), reh'g denied, 601 F.2d 586, cert. denied sub nom. Claiborne Hardware Co. v. Henry, 444 U.S. 1074 (1980) (citations omitted).

On the merits, however, the lower court did not apply a "maximization" or proportional standard in its remedy. Rather, the three-judge panel considered extensive evidence pertaining to the Gingles threshold requirements, App. 30a-53a, and found that "[t]he record clearly established that Florida's minorities have borne the social, economic and political effects of . . . discrimination." App 53a. Thereafter, the lower court provided for House districts only where violations were found under Gingles. Accordingly, the court's remedy avoided either a maximization or a proportional representation approach.[17]

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[16] See Judge Vinson's concurring opinion criticizing the reliability of the Appellants' contrary citizenship analysis data. App. 74a.

[17] The DeGrandy complaint, which was quoted by the lower court, asserted that the legislature intentionally "fragment[ed] cohesive minority communities and otherwise impermissibly submerge[d] their right to vote." App. 20a-21a. The complaint and the trial centered not on the number of Hispanic representatives but on the division of adja-cent Hispanic communities in order to protect Anglo incumbents. The United States' Motion to Dismiss or Affirm confirms the adequacy and correctness of the district court's findings. In addition, the Appellees emphasize the extensive evidence used by the district court in this case. In addition to consideration of the trial testimony, the lower court incorporated by reference its previous findings (in the congressional trial) regarding the existence of the totality of the circumstances factors in south Florida. DeGrandy v. Wetherell, 794 F. Supp. 1076.

The Appellants make two very different arguments regarding their new proportional representation defense. First, they argue that citizen voting age population (CVAP) is the measure that should be used to determine proportionality. Second, they argue that the lower court's reme-dial districts are ineffective due to lower citizenship levels in the Hispanic community. The Appellees respond to these assertions in sequence.

With regard to the proper population measure, Florida, as does every other state in the Union, bases it reapportionment decisions on total population statistics. In the 1990 census, there were 1,574,143 Hispanics (12%) among Florida's total population of 12,937,926. If proportionality were relevant to any Section 2 claim, which it is not, these numbers would presumptively entitle Hispanics living in Florida to fourteen legislative seats in the 120-member Florida House of Representatives (12%). The DeGrandy Appellants sought a plan of reapportionment that would have produced eleven Hispanic majority house districts; SJR 2-G contained a plan that would have produced only nine Hispanic majority house districts. Despite the fact that the Appellees did not seek, and did not obtain, a proportional remedy of fourteen seats, the Appellants mistakenly argue that their nine-seat plan achieves proportionality.

Florida apportions its legislative seats on the basis of total population, and the districts were drawn based on total population in accordance with the prior holdings of this Court regarding one person, one vote. See Richardson v. Burns, 384 U.S. 73 (1966); Kirkpatrick v. Priesler, 394 U.S. 526 (1969); Wesberry v. Sanders, 376 U.S. 1 (1964). Legislative seats having been to the various areas of the state based on total population, the Appellants would have the Court employ a different population base (CVAP) for the purpose of analyzing their affirmative defense of proportional representation. By using different population bases, the effect is to treat Hispanic communities differently from Anglo communities, thereby intentionally minimizing the number of minority districts. While this Court has stopped short of requiring that the population base should always be total population, it has insisted on consistency in the use of a population base by a state. Kirkpatrick, 394 U.S. at 530-531.

The dual population base measure suggested by the Appellants would allow the Anglo community of south Florida to use the higher minority population to locate additional seats in that region of the state, but would prevent the Hispanic community from sharing in the benefit of those additional districts.[18] The discriminatory effect of the Appellants' proposal of two population bases is exemplified by considering a hypothetical state of five million people with 100 legislative seats. Two million of these

[18] A violation of the Voting Rights Act is established if a protected class has "less opportunity than other members of the electorate to participate in the political process and elect candidates of their choice." 42 U.S.C. § 1973. Obviously, using the dual population base measure of proportionality suggested by the Appellants provides white voters more electoral opportunities solely because of the presence of a minority population that is unable to vote.

people are located in the southern part of the state entitling that part of the state to forty seats. One million of the people in the southern region are members of the language minority; of that language minority, half are not eligible to vote but all of the language majority population in that area are eligible to vote.

If total population is used to reapportion and is also used as the measure of proportionality, then the Hispanic minority would not achieve proportional representation until they reached twenty seats. If, however, the Appellants' dual population base scheme is used, the Hispanic minority will have achieved proportionality at ten seats. The Anglo majority of the southern region of the state would get ten additional seats, solely because of the presence of the underage or non-citizen members of the Hispanic minority and the use of a dual population base. This result not only discriminates against the Hispanic minority but also against all voters elsewhere in the state.

As the Ninth Circuit Court of Appeals stated in Garza v. Los Angeles, 918 F.2d 763 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991):

> The purpose of redistricting is not only to protect the voting power of citizens; a co-equal goal is to ensure "equal representation for equal numbers of people." Kirkpatrick, 394 U.S. at 531. Interference with individuals' free access to elected representatives impermissibly burdens their right to petition the government. Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). . . . Since the whole concept of representation depends upon the ability of the people to

make their wishes known to their representatives, this right to petition is an important corollary right to the right to be represented. Non-citizens are entitled to various federal and local benefits, such as emergency medical care and pregnancy-related care provided by Los Angeles County . . . As such, they have a right to petition their government for services and to influence how their tax dollars are spent.

In this case, basing districts on voting population rather than total population would disproportionately affect these rights for people living in the Hispanic district. Such a plan would dilute the access of voting age citizens in that district to their representative, and would similarly abridge the right of aliens and minors to petition that representative.

Garza, 918 F.2d at 775 (citations omitted).

This Court, in Gingles, discussed in detail the legal significance of pro-portional minority candidates' success. The court below properly applied its instruction that proportional representation is not a defense to a Fifteenth Amendment violation nor to a Section 2 violation. See Gingles, 478 U.S. at 76 n.37, citing Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd sub nom. East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam).[9]

[9] This Court in Gingles stated:

II. THE REMEDIAL DISTRICTS DRAWN BY THE COURT ARE CAPABLE OF ELECTING CANDIDATES OF THE MINORITY COMMUNITY'S CHOICE.

The Appellants' argument that the Hispanic community is not sufficiently large to constitute a voting age majority in eleven districts in south Florida is premised upon the assertion, rejected by the trial court, that Dr. William DeGrove's regression analysis conclusively proves that substantial portions of the voting age Hispanic population are non-citizens. Thus, their appeal is founded upon the mistaken belief that this Court should redetermine what they deem to be a mixed question of law and fact. To the contrary, this Court has repeatedly held in both White v. Regester, 412 U.S. 755 (1973), and Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985), that review in vote dilution cases is subject to the clearly erroneous standard accorded to factual findings pursuant to Fed. R. Civ. P. 52. Evidence of citizenship sub-mitted by Dr. DeGrove

> [T]he election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote," noting that if it did, "the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a "safe" minority candidate. . . . The Senate Committee decided, instead, to "require an independent consideration of the record" [which] depends upon a searching practical evaluation of the "past and present reality."

Gingles, 478 U.S. at 75, citing, S. Rep. No. 417, 97th Cong. 2d Sess. 31 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 208 (at 29).

was specifically rejected by the trial court as unreliable. This finding is not clearly erro-neous.[20]

In Ketchum v. Byrne, 740 F.2d 1398, 1411 (7th Cir. 1984), the Seventh Circuit approved the use of a greater voting age population to adjust for the presence of Hispanic non-citizens, or lower registration and voter turnout, in proposed minority districts.[21] The Ketchum approach of increasing the percentage of Hispanic voting age population to offset for the presence of non-citizens in Chicago was the same approach that the court below utilized to account for the presence of non-citizens, or diminished registration and voter turnout, in Dade County. App. 30a-40a.

The court below, in analyzing the House plans, used past election results and expert testimony in arriving at a generally effective voting age population percentage (60%) that reflected Hispanic voting strength in the particular

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[20] The court stated:

> Despite the lack of available data, the defendants presented estimates of Hispanic citizenship and attempted to apply them to individual districts. These estimates are unreliable. For example, William DeGrove's analysis was based on a somewhat unorthodox regression analysis methodology . . . [which] must be viewed with low confidence and with a large range of error.

App. 74a.

[21] Ketchum states that the term "effective majority" means 'a majority of the population substantial enough to allow group choice to be effective.' In the case of minority groups, the 'minority must constitute more than half of a district's population in order to obtain an effective electoral majority.'" Ketchum, 740 F.2d at 1410-411 n.13.

circumstances of south Florida.[22] App. 55a-57a; see also App. 58a n.46. Showing even more care and sophistication in applying this indicator to individual plans, the court located non-voting Hispanic populations in south Florida and required that the VAP for those areas be greater than 60% in order to compensate for the lower voting strength in those areas. App. 70a-71a.[23,24]

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[22] Cases cited by the Appellants for the proposition that "effective voting majority" must be shown in order to meet the "sufficiently large" test, are not applicable in this case because, based upon past election data, the court below found that "effective" voting majorities existed in the proposed Hispanic districts. The lower court's approach was based on evidence showing that, when the Hispanic voting age population exceeds 59% of an election district, the Hispanic community is able to elect candidates of its choice and overcome the effects of racial bloc voting. The panel rejected the proffered testimony of Dr. William DeGrove that, in the remedial districts, non-citizen voting age population reduced Hispanic majorities to below 50%. This testimony was not persuasive in light of the evidence of past electoral success of Hispanic candidates in the pro-posed districts under the illustrative plans.

[23] Indeed, this is the very reason that the DeGrandy remedial plan was selected over the second remedial plan of the Appellants. As noted by the court, "areas with high concentrations of recent Hispanic arrivals must have a VAP significantly higher than our 60% guideline level . . . Because these two 61 percent districts are located in areas with high concentrations of recent Hispanic arrivals, we find that these districts do not give Hispanics a reasonable opportunity to elect candidates of their choice." App. 70a.

[24] The district court had before it the statistics of past elections in south Florida involving Hispanic candidates. App. 45a-47a. The court also heard numerous experts; the testimony of Dr. Allan Lichtman and Dr. Dario Moreno was specifically cited by the court in its opinion. The Appellants also provided testimony regarding the proper level of VAP necessary to ensure that Hispanic voters could control a single member district. The trier of fact did not find the Appellants' expert testimony to be persuasive. This factual dispute is the real issue

In Romero v. City of Pomona, 883 F.2d 1418 (9th Cir. 1989), the court discussed the use of "effective voting majority" as the proper standard for measuring whether a minority group is sufficiently large. Because the court below used an analysis that took voting majority effectiveness into account, its decision is not in conflict with Romero.

The Appellants seek to persuade this Court that Congress intended to bar suits under Section 2 if proportionality has been achieved.[25] In fact, while Congress undoubtedly intended to remove a requirement of proportionality as a prerequisite for compliance with Section 2, it certainly did not intend to create a bar to minority group success. The proportionality defense was not factually developed before the court below and its offer at the appellate level should not district the Court from the lack of an evidentiary basis for such a claim. The court below did not discuss proportionality because it was not presented as a substantive defense. During the trial, it was a not an issue. The court followed the congressional intent established by Section 2 and omitted proportional considerations from its analysis.[26]

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defendant seeks to relitigate in this appeal.

[25] Proportionality considerations, if not barred by the statutory language of Section 2, would invariably revolve around such issues as the appropriate figure to use for the numerator in such equations: is it total population, voting age population, registered voters, citizen population, or citizen voting age population? In addition, a court would be faced with the geographic area to be considered: should the area be the entire state of Florida in which proportion should be measured, or a subdivision thereof? If a subdivision, which subdivision would be appropriate as a uniform rule?

[26] See App. 75a.

While the DeGrandy Appellees agree with the response of the United States that the relevant area in making a proportionality defense is the state of Florida, DeGrandy Appellees would also note that such a view is not necessary to recognize that the Appellants' attempt to confine the case to Dade County is totally arbitrary.[27] In fact, even SJR 2-G is not confined to Dade County. Although Dade borders three other counties (Monroe, Collier, and Broward), only the Broward County line is sacrosanct under SJR 2-G.[28]

Neither the Appellees nor the court confined itself to Dade County. If surrounding counties are added, it becomes clear that Appellants chose the only configuration and population base that would allow them to raise proportionality as a defense and then attempted to ignore adjacent minority population because it was on the other side of the county line.

The only case cited by the Appellants for the proposition that proportional representation is a bar to a Section 2 claim, Nash v. Blunt, 797 F. Supp. 1488 (W.D. Mo.

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[27] In rejecting the Appellants' proposed remedy, the district court noted that "[b]ecause the Florida House defendants arbitrarily confined its [sic] changes to Dade County, the House defendants' second remedial plan does not create eleven effective House districts which give Hispanics the potential to elect candidates of their choice." App. 69a.

[28] Whatever the genesis of this state policy of not crossing the Broward County line (Appellants' Jurisdictional Statement at 26), it is obviously recent and not consistently applied. The Senate Report accompanying the 1982 amendments to the Voting Rights Act noted that the tenuousness of a state policy that has the effect of diluting minority voting strength is a factor in the totality of the circumstances evaluation. Thornburg v. Gingles, 478 U.S. 30, 37 (1986).

1992), arose in a clearly distinguishable factual setting. In Nash, the court found a ten-year history of proportional representation, as well as a near certain likelihood that there would be proportional representation in the future. No such history was proven in south Florida because it simply does not exist.

III. THE ABSTENTION DOCTRINE HAS NO APPLICATION WHERE PLAINTIFFS SEEK REDRESS FOR VIOLATION OF A FEDERAL STATUTE IN FEDERAL COURT AND NO STATE COURT HAS ADJUDICATED THE CLAIM.

The Appellants' abstention argument is premised upon a confrontation between a federal court and a state court that never occurred. The record reflects that the Florida Supreme Court expressly refused to decide whether the House reapportionment plan complied with Section 2 of the Voting Rights Act.

State judicial review of a joint resolution of apportionment has always been, and remains, limited. The state Supreme Court describes the review as "facial" because it does not receive testimony or make findings of fact. Specific factual challenges to a plan of apportionment must be heard in subsequent proceedings, either in state or federal court. In re Apportionment Law, Senate Joint Resolution No. 1305, 263 So. 2d 797, 808 (Fla. 1982). Accordingly, the Florida Supreme Court reserved the right of any person to bring a challenge to the joint resolution "through a presentation of evidence in accordance with the Gingles' analysis of the Voting Rights Act." In re Senate Joint Resolution 2-G, 597 So. 2d at 285.

Because the Florida Supreme Court did not adjudicate Section 2 claims, the federal district court does not have to give full faith and credit to a judgment that did not

decide the issues before it. Haring v. Prosise, 462 U.S. 306, 313 (1983). For the same reasons, abstention under the Rooker-Feldman doctrine does not apply, because the district court is not reviewing an adjudication of Section 2 claims, but, rather, is deciding those issues for the first time. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

The Appellants' true complaint is that the DeGrandy Appellees brought their Section 2 challenge in federal court, rather than state court. The Appellants cannot, however, cite to this Court any decision holding that a plaintiff must bring a Section 2 action in state court. To the contrary, a plaintiff seeking redress under a federal cause of action has a right to pursue that claim in federal court -- a right that no state can abridge. Barrow v. Kane, 18 S. Ct. 526 (1898).

The lower court's decision to dismiss the Appellants' abstention argument was proper. When proceeding under 42 U.S.C. § 1983, a plaintiff may select either state or federal jurisdiction. The Appellees initiated this action concerning strictly federal constitutional and statutory issues on January 14, 1992, months prior to any state court proceeding. Although a state forum was available, the Appellees chose the federal forum instead. "[T]his Court has uniformly held that individuals seeking relief under 42 U.S.C. § 1983 need not present their federal constitutional claims in state court before coming into a federal forum." Zablocki v. Redhail, 434 U.S. 374, 379-380 n.5 (1977), citing Wisconsin v. Constantineau, 400 U.S. 433, 437-439 (1971); Zwickler v. Koota, 389 U.S. 241, 245-252 (1967); and Huffman v. Pursue, Ltd., 420 U.S. 592, 609-610 n.21 (1975).

Although not required to do so, the court below repeatedly deferred to state proceedings throughout the apportionment process.[29] Only after the State of Florida had a legally enforceable House plan, and Section 2 challenges were lodged against it, did the federal court exercise jurisdiction. At that point, no proceedings were pending in any state court concerning legislative apportionment, and the sole issue remaining was whether the existing, otherwise legally enforceable plan violated Section 2 of the Voting Rights Act. The federal district court had not only the right, but also the obligation, to entertain that federal claim at that time. 42 U.S.C. § 1973a. As this Court stated in New Orleans Pub. Serv., Inc. v. New Orleans, 491 U.S. 350, 373 (1989):

> It is true that the federal court's disposition of such a case may well affect, or for practical purposes pre-empt, a future or, as in the present circumstances, even a pending state-court action. But there is no doctrine that the availability or even the pendency of a

[29] When the Appellees brought their action in federal court in January 1992, the federal court dismissed the complaint, holding that the state legislature should have more time to pass a plan of apportionment. Even after reluctantly accepting jurisdiction in March, the court emphasized that it was not enjoining any state redistricting proceedings. App. 12a. Thereafter, when the Legislature passed a Joint Resolution of apportionment on April 10, 1992, the federal court bifurcated its trial schedule, setting the trial on congressional redistricting first and delaying a hearing on state redistricting. When the Florida Supreme Court entered its order on the facial validity of the Joint Resolution, the federal court, on its own motion, stayed all proceedings concerning state legislative redistricting pending Section 5 review. Finally, despite numerous requests by the Appellees to lift the self-imposed stay and to begin trial during the preclearance process, the federal court refused, and deferred all action until the U.S. Attorney General issued his decision.

> state judicial proceeding excludes the federal courts. Viewed as it should be, as no more than a state-court challenge to completed legislative action, the Louisiana suit comes within none of the exceptions that Younger and later cases have established.

If the Court were to adopt the theory put forward by the Appellants under these facts -- that the mere presence of an alternative forum warrants abstention -- then a federal court would never be able to hear cases involving civil rights protected under the United States Constitution.

The Appellants claim that the decision in California Democratic Congressional Delegation v. Eu, 790 F. Supp. 925 (N.D. Cal. 1992), conflicts directly with this case[30]; however, the circumstances of that case clearly distinguish it from the case at bar. The California plaintiffs had filed their case with the California Supreme Court as permitted by the state constitution. Long before a case was filed in federal court, the California Supreme Court, through a Special Master, heard extensive evidence on the totality of the circumstances and had drawn a plan that was designed to meet any possible Voting Rights Act challenge. Wilson v. Eu, 823 P.2d 545 (Cal. 1992). By the time that the federal district court declined jurisdiction, the California Supreme Court had already produced maps and reached a final adjudication of the Voting Rights Act issue. If the

[30] The California case was a traditional "legislative deadlock" case accepted under the California Supreme Court's original jurisdiction in such circumstances. The instant case was a mandatory, but facial, review required before the redistricting scheme passed by the Florida Legislature could take effect. See Fla. Const. art. III § 16(c). Moreover, in California Democratic Congressional Delegation v. Eu, the state case was filed first.

district court there had exercised jurisdiction, it would have been in the position of an appellate court in violation of the Rooker-Feldman doctrine.[31] No such circumstances existed here because the Florida Supreme Court had expressly refused to adjudicate the Section 2 issues.

Finally, federal courts do not abstain or defer to a state court in an action that involves a person asserting the rights under the Voting Rights Act asserted here. 42 U.S.C. § 1973j(f) ("The district court . . . shall exercise [jurisdiction over Voting Rights Act cases] without regard to whether a person asserting rights under [the Act] shall have exhausted any administrative or other remedies that may be provided by law.")

IV. THE REMEDIAL HOUSE PLAN ADOPTED BY THE COURT BELOW FOLLOWED THE EQUITABLE STANDARDS SET BY THIS COURT.

After finding a violation of Section 2, the court below followed, as closely as practicable, this Court's remedial procedure for reapportionment of the state House. The remedial duty a court faces upon making a finding of Section 2 liability is, foremost, to "exercise its traditional equitable powers to fashion relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 417, 97th Cong. 2d Sess. 31 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 208. In fashioning its

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[31] Once the case had been decided by the California Supreme Court, the legislative policy of 28 U.S.C. § 2284 of providing rapid review and avoiding multiple stays by numerous courts would be better met by abstention and allowing any challenge of the California Supreme Court decision to be taken directly to this Court by certiorari.

remedy, the court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965). A court cannot "authorize an element of an election proposal that will not with certitude completely remedy the Section 2 violation." Dillard v. Crenshaw County, 831 F.2d 246, 252 (11th Cir. 1987) (emphasis in original).

The appropriate standard for court remedial action was adopted in Wise v. Lipscomb, 437 U.S. 535, 540 (1978), which requires courts to defer to state legislatures in redrawing plans where practical. However, "when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation' . . . of the federal court to devise and impose a plan pending later legislative action." Id. at 540. Here, the legislature had been unable to pass a reapportionment plan during its regular session. The reapportionment plan passed in the special session was approved by the state Senate by a margin of only one vote. Had a new plan been available, resubmission to the state Supreme Court and preclearance by the Attorney General would have been required. By the time the court made its finding of liability, filing for elections was less than two weeks away. Notwithstanding the late hour, the court granted the Appellants an opportunity to devise a plan. The Appellants' response was to submit a remedial plan that the court determined did not fully remedy the violation it had found. App. 68a-69a. In contrast, the Appellees proposed to the court a constitutionally appropriate plan that fully addressed and remedied the violation. Because this plan followed the spirit and the letter of the law, the court adopted the DeGrandy plan.

This Court elected to stay the court-imposed remedy based upon the Appellants' representations in their motions for stay. After full reflection on the record, however, this Court should endorse the remedial measures adopted by the court below as consistent with its equitable duty to eliminate racial vote dilution fully and completely. The 1994 elections should not be conducted under a reapportionment plan that has been found to violate Section 2.

CONCLUSION

For these reasons, the appeal should be dismissed or the judgment below summarily affirmed.[32]

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[32] The Appellees disagree with the United States' suggestion that this case be held pending this Court's decision in Voinovich v. Quilter, No. 91-1618. The issue of influence districts in that case is clearly distinguishable from the situation in south Florida. The amici who raise the influence issue in Voinovich assert that polarized voting is largely non-existent in Ohio, as are other elements of the totalities of the circumstances required to find a violation of Section 2 of the Voting Rights Act. 42 U.S.C. § 1973. See Brief Amici Curiae of Stokes, et al. In south Florida, the district court found extensive evidence of vote dilution that required a remedy. Had the DeGrandy plaintiffs been given an opportunity to present a remedial plan for the state Senate that addressed the findings of the district court (the court allowed the state House defendants such an opportunity), then this issue could have been avoided, because Plaintiffs assert that they can draw a remedial plan for the state Senate that preserves African-American voting strength.

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FILING CERTIFICATE

I hereby certify that on this 30th day of December, 1992, I filed 40 copies of a Motion to Dismiss or Affirm with the Clerk's Office of the Supreme Court of the United States via first class mail, postage prepaid. The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.

I declare under penalty of perjury that the foregoing is true and correct.

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Supreme Court, U.S.
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No. 92-519

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

T. K. WETHERELL, *et al.*,
Appellants,
v.
MIGUEL DE GRANDY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

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BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

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1. The United States has conceded that the district court's remedial order must be vacated. *See* U.S. Mot. at 20.[1] The United States has not expressly conceded error on liability, but has made a series of predicate concessions that, taken together, require summary reversal.

The United States concedes that "persistent proportional representation is generally a defense to a Section 2

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[1] The De Grandy Appellees seek to justify the district court's remedial order as a necessary reaction to then-imminent 1992 elections. As the United States points out, however, that rationale will not support imposing the remedial plan for all future elections. *See* U.S. Mot. at 20.

claim." U.S. Mot. at 11. *See Thornburg v. Gingles*, 478 U.S. 30, 77 (1986); *id.* at 102. *See also Baird v. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992). The United States has also conceded that the instant claims must be assessed by examining the challenged plan's impact on "eligible voters"—*i.e.*, citizens.[2] The United States concedes that, *on a statewide basis*, Hispanic citizens are proportionally represented in the Florida House of Representatives.[3] In effect, therefore, the United States concedes that SJR 2-G complies on a statewide basis with all substantive requirements of Section 2.

The United States asks, nonetheless, that the district court finding of liability be affirmed, while suggesting that Appellants can move to modify the judgment upon remand for a new remedial proceeding. *See* U.S. Mot. at 14-15 & n.6. The only material reason the United States can offer for affirming a concededly erroneous judgment in this case of great public importance is the suggestion that Appellants failed at trial to introduce Census data showing statewide citizenship levels.

Appellees can hardly fault Appellants for failing to introduce Census data that they themselves have noted "was simply unavailable" at the time of trial. *See* U.S. Stay Opp. at 11. Moreover, this Court may take judicial notice of the recently available Census data cited by the United States, which confirms that Hispanics are proportionally represented in the Florida House of Representatives on a statewide basis. *See* note 3, *supra*. Census data is routinely judicially noticed, even on appeal.[4]

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[2] *See* Mem. For The United States In Opp. To App. For Stay, at 11, *Wetherell v. De Grandy*, No. A-32 (U.S. July 14, 1992) ("U.S. Stay Opp.").

[3] *See* U.S. Mot. at 14, n.5.

[4] Federal Rule of Evidence 201 authorizes judicial notice of a fact "at any stage of the proceeding," Fed. R. Ev. 201(f), including on appeal, 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5110, at 524-25 (1977), and at 279, n.15 (1992 Supp.) (collecting cases). Courts routinely take judicial notice of Census data. *See, e.g., Barber v. Pointe*, 772 F.2d 982, 998 (1st Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986); *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1157 (5th Cir. 1981) (redistricting case); *Neal v. Coleburn*, 689 F. Supp. 1426, 1428 (E.D. Va. 1988) (same).

Because there is no dispute that statewide proportionality satisfies Section 2 as a matter of law and no dispute that statewide proportionality exists as a matter of fact for Hispanic citizens, summary reversal is entirely appropriate at this juncture.[5]

2a. Summary reversal is required even absent these concessions because Appellants need not have proved *statewide* proportional representation to defeat the case Appellees made at trial. Appellees simply mischaracterize the proceedings below when they argue that "the premise" of their case "was that to remedy dilution throughout the State, the State was required to draw minority districts where it could"—*i.e.*, Dade County. U.S. Mot. at 12.

The United States' complaint alleged vote dilution in "*several areas of the State*," not "throughout" the State. Dade County was the only "area" where Hispanic vote dilution was alleged to have occurred. Appendix to U.S. Mot. at 3a (emphasis added). At trial, Appellees expressly limited their Hispanic vote dilution claims to Dade County, and presented no evidence of alleged Hispanic vote dilution outside Dade County. *See* Tr. I, 52; Brief in Opp. Appendix ("Opp. App.") 1a. Indeed, they voluntarily dismissed all claims of Hispanic vote dilution out-

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[5] There is no merit to the De Grandy Appellees' argument that proportionality must be measured on the basis of "total population," rather than citizens. *See* De Grandy Mot. at 14-15. The Voting Rights Act protects the rights of "citizens," and is intended to ensure that minority voters do not have less opportunity than other "members of the electorate" to "elect representatives" of their choice. 42 U.S.C. § 1973. The United States has not advanced the argument that total population is the relevant group for this analysis.

side Dade County—a step utterly inconsistent with any effort to prove statewide vote dilution. Tr. III, 5, 214. The district court squarely ruled that to "conform[] the pleadings to the evidence . . . on the House side[] the only attack is to Escambia County and Dade County. . . . All of those other counties are out of the case." Tr. III, 215.[6]

Moreover, Appellees did not demonstrate that Hispanics outside Dade County are politically cohesive with Hispanics within Dade County—an indispensable element of any purported statewide case, *see Gingles*, 478 U.S. at 50-51. Appellees' expert conceded he did not know whether such political cohesion existed, *see* Tr. III, 292; Opp. App. 1a, and the District Court found cohesion only for Dade County Hispanics. App. 44a-47a. Thus, there is no evidence that creating additional Dade County Hispanic districts would result in meaningful representation of Hispanic voters living in other parts of the State.

In sum, Appellants' defense squarely met the vote dilution claim Appellees presented at trial. This Court limits its review to the districts actually challenged, *Brown v. Thompson*, 462 U.S. 835, 846 (1983), and must therefore reverse the finding of liability based on Appellants' undisputed showing of proportional representation in the Dade County area. For similar reasons, there is no merit to the United States' argument that "Appellants' theory is fraught with legal and practical difficulties" because it permits defendants unilaterally to define the area of a State in which proportionality exists. U.S. Mot. at 13. Appellants did not unilaterally define a subset of the State and then claim proportionately within that subset—they

[6] Claims of vote dilution in Escambia County involved African-Americans and are no longer a part of this case.

demonstrated persistent proportional representation in the areas defined by the plaintiffs' cases-in-chief.[7]

b. The argument that proportional representation is a valid defense only when shown on a statewide basis is, in any event, wrong as a matter of law. The text of Section 2, which protects the right to "*elect* representatives of choice," forecloses any such argument. *Thornburg v. Gingles* also forecloses the argument. The Court in *Gingles* determined that persistent proportional representation in one of the districts challenged in that case constituted a complete defense to the vote dilution claim with respect to that district. 478 U.S. at 77; *id.* at 103. Had statewide proportionality been required, the achievement of proportional representation *only* in this single district would not have justified reversal of the district court's liability finding. *See also id.* at 61, n.28 ("The inquiry into the existence of vote dilution . . . is district specific.").

Moreover, if the judgment below stands for the principle that proportionality must be shown on a statewide basis, summary affirmance would leave undisturbed a square conflict on an issue of obvious importance. In *Nash v. Blunt*, 797 F. Supp. 1488 (W.D. Mo. 1992), a three-judge district court considering Section 2 challenges to Missouri's legislative reapportionment squarely rejected the argument Appellees advance here. *Id.* at 1499 ("there is no authority to suggest that these citizens' inability to be

[7] Appellees make much of the fact that Appellants presented alternative proportionality defenses for both Dade County proper (which comprises a population entitled to approximately 18 House Districts) and a somewhat broader 20-district "Dade County area." Appellants were, however, forced to present alternative defenses because the De Grandy plaintiffs and the United States advanced different definitions of the relevant geographic frame of reference. De Grandy alleged vote dilution in Dade County proper, while the United States alleged vote dilution in the 20-district "Dade County area." Regardless, Appellants demonstrated that Hispanics are proportionally represented under either alternative, *see* J.S. at 4 and n.11, a point Appellees do not contest.

included together in one or more districts should be 'made up' by increasing the number of minority controlled districts in those areas of the state where black citizens are most concentrated").

c. At bottom, Appellees cannot justify the judgment below as a "straightforward application" of *Gingles*. *See* U.S. Mot. at 8. The dispositive issue is not whether additional Hispanic House districts could have been drawn in Dade County, but whether the Voting Rights Act required the State of Florida to create those additional districts. *Gingles* cannot answer that question. The identification of additional districts that could be drawn is merely a threshold plaintiffs must pass before reaching the dispositive issue whether, based on the size of the protected minority class, those districts are required to be drawn.

The district court's failure to grasp this critical point led it to convert *Gingles* into a maximization requirement as applied to single-member districts.[8] That is why the court, having concluded under *Gingles* that two additional Dade County Hispanic districts could be drawn, completely ignored Appellants' proportionality arguments. The district court did not even *consider* "the extent to which minority candidates have succeeded," which the Senate Report to Section 2 specifically identifies as a critical factor in the required "totality of the circumstances" analysis. *Gingles*, 478 U.S. at 75; S. Rep. No. 417, 97th Cong. 2d Sess. 29 (1982), *reprinted in* 1982 U.S. Code & Admin. News 177, 206-07.

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[8] This result is especially disturbing because it exposes single-member district plans to a greater degree of scrutiny than multi-member district plans when it is multimember districts that present the inherent risk of submerging the voting strength of a minority that could elect representatives of its choice in single-member districts. *See Gingles*, 478 U.S. at 47 & n.13 (O'Connor, J.); *Rogers v. Lodge*, 458 U.S. 613, 616 (1982).

d. Lacking any substantive argument for affirmance, the De Grandy Appellees have resorted to the frivolous claim that proportionality "was not presented as a substantive defense" in the district court. De Grandy Mot. at 20; *id.* at 12. On a motion for directed verdict, counsel for the Senate specifically argued that proportional representation defeats a vote dilution claim. *See* Opp. App. 1a. Counsel for the House expressly "adopted the position of the Senate" and argued that SJR 2-G "in fact provides more than proportionality." Tr. III, 193. Counsel for the House raised the proportionality defense again in closing argument. Tr. VIII, 78-79.[9]

3. Appellees also miss the point of Appellants' challenge to their failure to take citizenship levels into account. Appellees focus on whether the district court's conclusion that 11 effective Hispanic House districts *could* be drawn in Dade County was clearly erroneous because it failed to account for citizenship levels. *See* U.S. Mot. at 15; De Grandy Mot. at 17. That ruling was clearly erroneous —given the indisputably high percentages of Hispanic noncitizens in Dade County[10]—but the critical issue in

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[9] There is no merit to Appellees' unsupported argument that the proportionality defense was waived because it was not expressly pleaded as an affirmative defense pursuant to Fed. R. Civ. P. 8. Proportionality is not in the nature of confession and avoidance; it constitutes a direct refutation of Appellees' central claim that Hispanics have less opportunity to elect representatives of choice than do other members of the Dade County electorate. Thus, the defense was pled by specific denial of Appellees' claim of vote dilution. In any event, "if evidence relating to an unpleaded [affirmative] defense is introduced without objection, [Fed.] Rule [Civ. Pro.] 15(b) requires the pleadings to be treated as if they actually had raised the issue." 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1278, at p. 495, 498 (1990). Appellees raised no objection to the substantial evidence of proportional representation introduced by Appellants at trial. *See* J.S. at 4-5, nn.10-12.

[10] As demonstrated, Appellants introduced unrebutted evidence estimating that 55% of Dade County's voting age Hispanics were

this case is not whether 11 effective Hispanic House districts *could* have been created in Dade County. Rather, this case turns on whether Section 2 *required* that 11 such districts be drawn.

To resolve that issue, citizenship levels must be considered. On its face, the Voting Rights Act protects only "a denial or abridgement of the [voting] right of any *citizen* of the United States." 42 U.S.C. § 1973(a) (emphasis added). As the Court made clear in *Gingles*, "[t]he essence of a Section 2 claim is that a challenged electoral law . . . cause[s] an inequality in the opportunities enjoyed by black [or other minority] and white *voters* to elect their preferred representatives." 478 U.S. at 47 (emphasis added).

Because it is undisputed that Hispanics constitute less than 40% of the citizen population of Dade County, and SJR 2-G affords those Hispanic citizens the opportunity to elect their candidates of choice in 50% of the Dade County districts, Hispanic citizens have the ability to elect substantially more than their fair share of preferred representatives. This substantial relative overrepresentation precludes any finding that SJR 2-G affords Hispanics "less opportunity . . . to elect representatives of their choice" than that available to "other members of the electorate" in Dade County. 42 U.S.C. § 1973(b).

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not citizens. *See* Testimony of W. De Grove, App. 187a-198a. Although Appellees now attack these results and the methodology that produced them, that methodology—bivariate ecological regression analysis—was relied upon by the Court in *Thornburg v. Gingles*, 478 U.S. at 53 n.20, 52-74, and by numerous lower courts. *See, e.g., Overton v. City of Austin*, 871 F.2d 529, 539 (1989); *Solomon v. Liberty County, Florida*, 899 F.2d 1012, 1019-20 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 670 (1991). Additionally, official Census data that is now available supports this expert testimony. *See* R. Kominski, U.S. Bureau of the Census, Letter to J. Guthrie and attachments (Nov. 19, 1992), Opp. App. 5a.

4. Abstention and *res judicata* principles provide an independent basis for reversal.[11] The De Grandy Appellees indisputably raised their Section 2 claims first in the Florida Supreme Court proceedings. Although the Florida Supreme Court's rejection of those claims was not premised on a complete factual analysis, the court offered an immediate evidentiary hearing. The De Grandy Appellees thus had a full and fair opportunity to raise all factual issues in the Florida Supreme Court. *See, e.g., Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-82 & n.22 (1982). The De Grandy Appellees chose not to avail themselves of that opportunity, and must live with the *res judicata* consequences of that choice.

For similar reasons, the United States' claims should not be adjudicated by the federal court. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). The United States' claims required reconsideration of issues previously decided by the Florida Supreme Court, and resulted in the issuance of an injunction prohibiting the implementation of SJR 2-G. The federal court's subsequent order was thus more than merely an inconsistent judgment; it countermanded the prior Florida Supreme Court order to implement SJR 2-G. "[T]o reverse or modify [a] judgment [of the state supreme court] . . . [is] an exercise of appellate jurisdiction," *Rooker*, 263 U.S. at 416—which is exactly what this Court's decisions in *Rooker* and *Feldman* prohibit. The United States should have brought its claims in the state supreme court proceedings, or subsequently petitioned that court for a modification of its order. *See, e.g., Lapin v. Shulton, Inc.*, 333 F.2d 169, 172 (9th Cir.), *cert. denied*, 379 U.S. 904 (1964).

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[11] Resolution of this issue is required only if the Court decides either to affirm the liability determination or remand, because it would then dictate the entitlement of the De Grandy Appellees both to attorneys fees and to continued participation in any potential future proceedings.

CONCLUSION

The July 2, 1992 judgment of the district court should be summarily reversed. In the alternative, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX A

Statement of counsel for the United States:

> "Our presentation will be limited to . . . Dade County and Escambia County . . . and perhaps a couple of pockets elsewhere, but in a very minor nature."

Tr. I, 52.

* * * *

Testimony of Appellees' expert, Dario Moreno, at trial:

> Q: Have you looked into or do you know whether the Hispanics outside of Dade County are politically cohesive with Hispanics inside Dade County?
> A: No, I did not.

Tr. III, 292.

* * * *

Argument of Senate Appellants' counsel at trial:

> It is almost a litmus test from which we don't need to proceed any further by showing . . . proportional representation. It is the district 23 argument made in *Gingles*, that you cannot show discriminatory effect when all the evidence shows that you have at least a [pro]portion and probably much greater representation.

Tr. III, 189. *See also* Tr. III, 192 (Senate arguments adopted by Executive Appellants).

APPENDIX B

[SEAL]

UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS
Washington, D.C. 20233-0001

November 19, 1992

Mr. John Guthrie
Florida Senate
726 Capitol
Tallahassee, Florida 32399-1100

Dear Mr. Guthrie:

This letter is in response to our telephone conversation of November 18, 1992. You requested all available materials concerning the bilingual ballot provisions of Voting Rights Act coverage for Dade County, Florida. A copy of the tabulations for Dade County, and a memorandum describing the full package of tabulations from which they have been taken, is enclosed. As I noted to you in our conversation, a full tabulation of citizenship by race/ethnic statuses does not exist. The tabulations you have here are all that exist on this topic, to my knowledge, for Dade County.

Based on the photocopy charges, the cost of the material you requested is $10.00. Please make your check or money order payable to Commerce-Census and send it, along with a copy of this letter, to the Statistical Information Staff, Population Division, Bureau of the Census, Washington, D.C. 20233.

If I can be of further help, please contact me on (301)-763-1154.

Sincerely,

/s/ Robert Kominski
ROBERT KOMINSKI
Chief, Education and
Social Stratification Branch
Population Division

County Level Florida			Voting Pop. -T-	English Not Only Language -U-	English Less Than Very Well -V-	English Less Than Well -W-	English Not Spoken -X-
A—Florida	12	#Tot.	987346	410532	174722	79437	17382
B—Dade County	025	%	100.0	41.5	17.6	8.0	1.7
		#Ilt.	27868	16707	13619	9822	3775
		%	2.9	4.1	7.8	12.4	21.8
D—American Indian	1	#Tot.	1517	360	169	88	13
E— Total		%	.1	.0	.0	.0	.0
F— Total		#Ilt.	55	44	39	29	3
G— Flags	00001-00001	%	3.7	12.3	23.1	33.0	23.1
2240							
D—American Indian	1	#Tot.	112	112	69	25	3
E— Total		%	.0	.0	.0	.0	.0
F—Mikasuki	917	#Ilt.	37	37	32	22	3
G— Flags	00001-00001	%	33.1	33.1	46.4	88.0	100.0
2240							
D—American Indian	1	#Tot.	109	88	54	20	3
E—Miccosukee	437	%	.0	.0	.0	.0	.0
F— Total		#Ilt.	32	30	25	17	3
G— Flags	00001-00001	%	29.4	34.1	46.3	85.0	100.0
2240							
D—American Indian	1	#Tot.	88	88	54	20	3
E—Miccosukee	437	%	.0	.0	.0	.0	.0
F—Mikasuki	917	#Ilt.	30	30	25	17	3
G— Flags	00001-00001	%	34.1	34.1	46.3	85.0	100.0
2240							

4a

D—American Indian	1	#Tot.	57	28	18	5	0
E—Seminole	438	%	.0	.0	.0	.0	.0
F— Total		#Ilt.	7	7	7	5	0
G— Flags	00001-00001	%	12.3	25.0	38.9	100.0	.0
2240							
D—American Indian	1	#Tot.	20	20	13	3	0
E—Seminole	438	%	.0	.0	.0	.0	.0
F—Mikasuki	917	#Ilt.	5	5	5	3	0
G— Flags	00001-00001	%	25.0	25.0	38.5	100.0	.0
2240							
D—Asian American	3	#Tot.	7972	5092	1950	516	32
E— Total		%	.8	.5	.1	.0	.0
F— Total		#Ilt.	213	161	134	91	6
G— Flag	00100-00000	%	2.7	3.2	6.9	17.7	18.8
D—Asian American	3	#Tot.	1489	1489	981	392	24
E— Total		%	.1	.1	.0	.0	.0
F—Chinese	708	#Ilt.	145	145	118	91	6
		%	9.8	9.8	12.1	23.3	25.0
D—Hispanic	4	#Tot.	350499	332451	153529	73631	16946
E— Total		%	35.4	33.6	15.5	7.4	1.7
F— Total		#Ilt.	14655	13833	11799	9161	3739
G— Flags	11110-01110	%	4.2	4.2	7.7	12.5	22.1
D—Hispanic	4	#Tot.	330493	330493	152886	73403	16933
E— Total		%	33.4	33.4	15.4	7.4	1.7
F—Spanish	625	#Ilt.	13745	13745	11744	9132	3733
G— Flags	11110-01110	%	4.2	4.2	7.7	12.5	22.1

5a

County Level Florida			Voting Pop. -T-	English Not Only Language -U-	English Less Than Very Well -V-	English Less Than Well -W-	English Not Spoken -X-
D—Hispanic	4	#Tot.	12744	12136	5832	2037	470
E—Colombian	234	%	1.2	1.2	.5	.2	.0
F— Total		#Ilt.	320	314	254	129	85
G— Flags	00110-00000	%	2.6	2.6	4.4	6.4	18.1
D—Hispanic	4	#Tot.	12050	12050	5832	2037	470
E—Colombian	234	%	1.2	1.2	.5	.2	.0
F—Spanish	625	#Ilt.	314	314	254	129	85
G— Flags	00110-00000	%	2.6	2.6	4.4	6.4	18.1
D—Hispanic	4	#Tot.	46467	42376	16482	7160	1748
E—Puerto Rican	261	%	4.7	4.2	1.6	.7	.1
F—Total		#Ilt.	2891	2646	2171	1629	670
G— Flags	00110-00110	%	6.3	6.3	13.2	22.8	38.4
D—Hispanic	4	#Tot.	42284	42284	16476	7154	1742
E—Puerto Rican	261	%	4.2	4.2	1.6	.7	.1
F—Spanish	625	#Ilt.	2620	2620	2165	1623	664
G— Flags	00110-00110	%	6.2	6.2	13.2	22.7	38.2
D—Hispanic	4	#Tot.	240858	232685	111820	55435	12463
E—Cuban	271	%	24.3	23.5	11.3	5.6	1.2
F— Total		#Ilt.	8939	8500	7488	5943	2343
G— Flags	01110-01110	%	3.8	3.7	6.7	10.8	18.9
D—Hispanic	4	#Tot.	232191	232191	111689	55383	12456
E—Cuban	271	%	23.5	23.5	11.3	5.6	1.2
F—Spanish	625	#Ilt.	8487	8487	7475	5934	2348
G— Flags	01110-01110	%	3.7	3.7	6.7	10.8	18.9

[SEAL]

UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS
Washington, D.C. 20233-0001

June 8, 1992

MEMORANDUM FOR THE RECORD

From: Robert Kominski
Chief, Education & Social Stratification Branch
Population Division

Subject: Detailed Research Tabulations on Voting Rights

This document acts as a guide for interpreting the package of detailed tabulations provided to Congress and the Justice Department in June 1992 for their research in determining the effect of various alternative criteria in the reauthorization of the Voting Rights Act.

There are a number of subtabulations in the package. These are: a summary state-level tabulation, an Indian Reservation tabulation, and detailed tabulations for each state. Each tab has several rows and columns shown for each identified "language minority" group. The columns are labelled as the "Voting Pop"—that is, the voting age citizen population, "English not only language"—those who reported they speak a language other than English; "English less than very well"—those who said they speak English well, not well, or not at all; "English less than well"—those who said they speak English not well or not at all; "English not spoken"—those who said they do not speak English at all. Each successive column is a population subset of previous columns.

The first row in a sequence of four shows the estimated number of persons who meet the stated criterion in the

column. The second row shows the proportion that a given column is of the total (first column). The third row shows the number of persons in the column who have completed fewer than 5 years of schooling (that is, are illiterate by definition of the Act). The fourth row shows what percentage the third row value is of the first.

Letters at the left-hand side of the tabulations indicate the "level" of the tabulation. "A" indicates a state or reservation; "B" is a political jurisdiction (generally counties); "C" are subdivisions within counties; "D" are the aggregate language minority groups—American Indian, Eskimo or Aleut, Asian American, and Hispanic; "E" are subgroups of the "D" level, for example, Indian tribes, Eskimos alone, or specific Asian groups like Japanese or Filipino; "F" are specific languages; and "G" is a summary set of ten 0-1 flags which tell the following about the tabulated group:

Flag 1: D-level group exceeded 5% of the total voting age citizens in the state

Flag 2: D-level group exceeded 5% of the total voting age citizens at the B or C level

Flag 3: D-level group exceeded 7,500 voting age citizens at the B or C level

Flag 4: D-level group exceeded 10,000 voting age citizens at the B or C level

Flag 5: D-level group exceeded 5% of the voting age citizens within an Indian reservation

Flags 6-10 repeat this information, but the determination is based on the number of people who speak English less than very well, as opposed to simply all members in the group. In short, the first 5 flags incorporate a qualifying notion similar to that before the passage of the Nickles amendment, while flags 6 through 10 reflect the Nickles amendment criteria.

In general, for the state-specific tabulations, we show a data block (four lines) anytime a group constitutes a minimum of 2% or 3000 of the voting age citizens. In addition, we show the largest non-English language, or any that qualify.

The first tabulation is a summary state-level tab only for purposes of determining those states that may qualify for statewide coverage under Section 203c. As can be seen in the printout, in most states no groups qualify, which is why only a total block for the entire state is displayed. In some states a group might qualify if pre-Nickles criteria were used, but in only two states—New Mexico and Texas—does a group (Hispanics) meet statewide qualification under the Nickles guidelines.

The next tabulation shows the results of the Indian Reservation determinations. This tab shows the results for the reservations themselves, that is, which reservations might possibly qualify, and for what group(s). Note that the determinations are not limited to Indian groups.

The remaining tabulations are the detailed state-specific runs, incorporating both the statewide determination rules, the 5% political jurisdiction rule, the numeric minimum cutoff rule (again going down to 3000 persons), and an Indian reservation qualification rule. In the case of the latter situation, if an area in a county was qualified because of the Indian reservation guideline, the numeric code for the reservation(s) in question is noted immediately below the "G" level line. In Apache County, Arizona, for example, note that the county qualifies for the Apache language because of reservation 1140. This code denotes the Fort Apache Reservation in Arizona, identifiable by the 1140 code on the "A" line in the reservation tabulation. Looking at the second data panel for that reservation, one can see that Apache speakers who speak English less than very well constitute 38.5% of all the voting age citizens on the reservation, and that this

group has an illiteracy rate of 2.6% Consequently, the reservation qualifies. Since Apache County Arizona contains a part of this reservation, it is qualified by the reservation (even though most of the American Indians who live in this county speak Navajo, as shown in the Apache County tabulation). Gila and Navajo Counties also contain part of this reservation and for this reason are also qualified by the reservation.

These tabulations were designed to address a wide variety of questions about various alternative constructions and implementations of the Voting Rights Act. If there are questions about any of these data, please contact me on (301)-763-1154.

cc: Schneider (POP)
Norton
Walsh (DOD)
Chron

No. 92-519

IN THE

Supreme Court of the United States

October Term, 1992

MOTION FILED
NOV 24

T.K. WETHERELL, Speaker of the Florida House of Representatives, PETER R.WALLACE, Chairman of the Reapportionment Committee of the Florida House of Representatives, LAWTON CHILES, Governor of the State of Florida, ROBERT A. BUTTERWORTH, Attorney General of the State of Florida, and JIM SMITH, Secretary of State of the State of Florida,

Appellants,

v.

MIGUEL DE GRANDY, MARIO DIAZ-BALART, ANDY IRELAND, CASIMER SMERICKI, VAN B. POOLE, TERRY KETCHEL, ROBERTO CASAS, RODOLFO GARCIA, JR., LUIS ROJAS, LINCOLN DIAZ-BALART, JAVIER SOUTO, JUSTO LUIS POSO, ALBERTO CARDENAS, REY VELAZQUEZ, LUIS MORSE, ALBERTO GUTMAN, KAREN E. BUTLER, SGT. AGUSTA CARTER, JEAN VAN METER, ANNA M. PINELLAS, ROBERT WOODY, GINA HAHN, BILL PETERSEN, TERRY KESTER, MARGIE KINCAID and BROOKS WHITE and the UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Northern District of Florida

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS AND COMMUNITY RELATIONS COMMITTEE OF THE GREATER MIAMI JEWISH FEDERATION IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

1. Whether a state-enacted reapportionment plan violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because it does not maximize the electoral opportunities of a class of minority plaintiffs, notwithstanding that the plan provides the minority class with the opportunity to elect representatives in numbers at least equal to the class's proportion of the population?

2. When determining minority voting strength under the test of *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), may a plaintiff's case rest on estimates of voting age population that include substantial numbers of non-citizens who are ineligible to vote, or must the plaintiff demonstrate voting strength on the basis of eligible voters, at least where the defendant has demonstrated that

a substantial percentage of the plaintiff class are not citizens?

3. May a federal court impose a reapportionment plan as a remedy for a Voting Rights Act violation without affording the State any opportunity to devise an acceptable remedial plan, especially when the court-ordered plan unnecessarily trenches on fundamental state policy choices?

4. Do core principles of comity and federalism require a federal court to abstain from adjudicating Voting Rights Act claims when the plaintiffs seeking federal court relief have previously raised, and demanded and received adjudication of, identical claims in an ongoing state court proceeding?

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MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

Amici American Jewish Congress and the Greater Miami Jewish Federation move for leave to file this brief in support of appellants. The DeGrandy appellees refused to consent to the filing of this brief, making this motion necessary.

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the political, civil and economic rights of American Jews and all Americans. To this end, it has long supported legislation and judicial action to eliminate discrimination in the franchise. As early as the 1940's, it supported federal legislation to eliminate discrimination in voting.

The Community Relations Committee (CRC) of the Greater Miami Jewish Federation is the advocate for the

individuals, dealing only with the Jewish community as a whole. N.W. Cohen, Jews in Christian America, pp. 3-36 (1992).

The interest of the *Amici* in this case is not one merely of adherence to an historically important principle. The issues raised have practical consequences for the Jewish community, which for complex demographic and historical reasons is particularly likely to live in close proximity to minority groups. Starting with the redistricting challenged in *United Jewish Organizations of Williamsburgh* v. *Carey*, 430 U.S. 144 (1975), through last year's New York City redistricting, to redistricting this year in California, and now this case, Jewish communities which are physically compact, cohesive and which would ordinarily find themselves in one district, find themselves deliberately split asunder in the pursuit of majority-minority

survival and security of the Jewish community both at home and abroad. Through a broad coordinated program of activity, the CRC gives high priority to protecting democratic constraints, particular the Bill of Rights; and fostering a plural democratic society in the United States. Founded in 1973, the CRC is committed to the values of Jewish tradition and the American democratic heritage.

Amici have also steadfastly opposed efforts to transform the attack on invidious racial discrimination from an anti-discrimination principle into a system of proportional representation. It believes legislators represent people, not groups. This is an idea with deep resonance for American Jews. It served as a magnet for European Jewry, still bearing the scars of centuries in which European governments refused to acknowledge Jews as

the pursuit of majority-minority districts.

Jews make no claim to proportional or group representation. Demographic changes, shifting political alliances, among other causes, give no one and no group, including Jews, any right to rely on a particular districting configuration. But it is one thing to say that a group must take its chances in the districting process. It is quite another to say, as the District Court did here, that some groups have rights as groups and that others do not; indeed that some groups may be rendered politically impotent to further the interests of other groups.

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STATEMENT OF THE CASE AND FACTS

The *Amici* adopts the Appellant's statement of the case and statement of the facts.

INTRODUCTION

Redistricting is a zero-sum game. When legislative power is allocated to enhance the political power of some group, there is a necessary and concomitant decrease in the political power of some other group. Enfranchising minorities necessarily dilutes the power that majority groups previously enjoyed. Where those majority groups wielded power as a result of illicit oppression of racial and ethnic minorities, there is nothing untoward about the forced redistribution of political power. It was to further this end that the Voting Rights Act was enacted.

This case poses the different question of whether the Voting Rights Act ("VRA") requires an artificial enhancement of the political power of a group now a potent participant in the political process. Necessarily that enhancement comes at the expense of other groups or classes. These groupings, which are not minorities within the purview of the Voting Rights Act as it is ordinarily understood, may be as important to their members as race or ethincity are to members of racial minorities.

Ours is a society composed of a bewildering array of groups. Racial and language minority groupings are but one type of group, and they enjoy special status under the VRA.[1] But there are many

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1. To the best of our knowledge, no appellate court has passed on the question of whether non-minorities are protected by the VRA, and how the Act should be interpreted in regard to claims by whites of vote dilution.

other groups in our society. Religious groups are obvious examples. Substantial scholarship demonstrates that religious affiliations have a direct correlation with voting patterns. L.A. Kellstedt & M. A. Noll, Voting For President and Party Identification in Religion and American Politics: From the Colonial Period to the 1980's (ed. M.A. Noll) at 355 (1990); A Greeley, Religious Change In America, pp. 76-86 (1989). People of a common national origin, even if English is now the primary language of the group, are yet another example of politically meaningful groups. The Irish, Japanese-American and Polish communities are other prominent examples of this type of social and political group.

The relevant groupings are not only cast in immutable (or relatively immutable) terms such as race, religion, or

national origin. Republicans and Democrats are perhaps the most obvious example of groups sharing political interests in common. *Cf. Davis* v. *Bandemer*, 478 U.S. 109 (1986). Economic interests, accidents of geography, guild or professional interests (*e.g.*, unions, small business owners, farmers and the like) bring people together into voting blocks or communities of interest, typically with distinct demographic stratification resulting in residential patterns which can be taken into account in the districting process. Redistricting traditionally has taken these interests into account.

Even among racial minorities, political interests do not always coincide merely because groups share a common racial heritage or language, as the record in this case illustrates. The District Court found that the interests of African

Americans and Hispanics clash in a variety of ways, leading to shifting alliances with whites. Such clashes, moreover are not unique to Dade County, Florida. *See* J. Miles, *Blacks vs Browns*, The Atlantic (October, 1992) at 41-68; *Black and Hispanic Groups Battle Over Schools Post in Los Angeles*, New York Times (October 5, 1992) A-14, col 4.

Elsewhere, there are substantial differences between blacks of different origins. New York's racial mix is made more complex by rivalries between 'American' blacks and 'Caribbean' blacks. These differences suggest that factors other than race are at work in forming, nourishing and sustaining sociologically and politically significant communities.

Dade County, like many other urban areas, is composed of a complex mix of groups. In redistricting Dade county, the

Florida legislature attempted not only to comply with the twin mandates of one person, one vote and the VRA's requirement that minority groups have effective political voice, but to grant voice and representation to other social, economic, geographic and political groupings.

The judgment below, however, focused on the interests of only one such group (or, at best, two). Applying the *Thornburg* v. *Gingles*, 478 U.S. 30 (1986) test developed to assess the legality of multi-member districts to this single-member districting case, the District Court found that Hispanic power could be enhanced by the wizardry of computer-drawn lines beyond the number of districts created by the legislature's plan. The District Court put into a place a substitute districting plan devised by the Appellees which maximized Hispanic

political power beyond its proportion in the electorate.[2]

What the District Court failed to recognize -- indeed did not even mention -- is that this maximization of Hispanic power came at the direct expense of other groups, including, in this case, a large and cohesive Jewish community in the North Miami Beach and Hallandale areas, which was divided under the District Court's plan in order to create one of the two additional Hispanic seats. By contrast, the Legislature had preserved this group's cohesiveness by placing it in one legislative district.

The price paid by other groups, moreover, is not simply that they will be marginally less politically powerful.

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2. As Appellants note in their Jurisdictional Statement [21-25], there is a substantial question about how to measure ideal or natural minority strength in this case.

Because by the District Court's hypothesis the Dade County area is racially polarized, the groups intentionally sacrificed to maximize minority political power will be submerged in new majority-minority districts where they will be politically ineffectual and voiceless precisely because they are not Hispanic. Those campaigning for office in majority-minority districts have no incentive to appeal to non-minoroity voters; indeed, it is likely to be politically dangerous for them to do so.

So long as *Thornburg* v. *Gingles*, 478 U.S. 30 (1986) and *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977)[3] (hereafter "*UJO*") remain good law,

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3. AJCongress filed an *amicus* brief in support of the United Jewish Organizations. We there quoted with approval the prophetic dissenting opinion of Judge (Marvin E.) Frankel in that case:

(continued...)

some of this submergence of whites in minority districts is the inevitable result of the Voting Rights Act.

UJO in part rests on what we believe to be an erroneous sociological

---

3.(...continued)
There are unbearable and absurd implications in the notion of 'proportionality' between racial or ethnic *population* percentages and percentages of *districts* controlled by different racial or ethnic groups. Beyond the limited skin-color divisions, some 65% white and 45% 'nonwhite', Kings County has 10.7% Italian immigrants or people with at least one parent who immigrated from Italy, some unknown additional percentage of Italian ancestry, a similar figure of 5.9% plus unknown additional Russian, 35% Puerto Rican, 1.7% recently from Austria, 1.7% recently from Ireland (plus many more of Irish ancestry), 30.3% Jewish, 2.2% 'other' religions, 1.3% recent German immigrants, plus a dizzying mass of others 'whose lineage is so diverse as to defy ethnic labels.' How do we figure out the percentage of districts to be controlled by German Catholics, Russian Jews, black as against white Protestants, etc.! The short answer is, of course, that we don't. But the apparent 'test' in today's majority opinion (31.4% nonwhite districts a 'good' figure because less than the 35.1% nonwhite Kings County population) implies that perhaps we should.

510 F.2d 512, 533 (S.D.N.Y. 1975) (Frankel, J., dissenting), *aff'd*, 430 U.S. 144 (1977). (citations omitted)

assumption -- that whites are fungible, that they share an overriding comity of interests merely because of the happenstance of their skin color, and that whites in one place who are submerged in a minority district will be vicariously represented by whites elsewhere who dominate a different district. *Compare* 430 U.S. at 165-66; *id.* at 178 (Brennan, J., concurring); *id.* at 195 (Burger, C.J., dissenting).

It is simply not the case, of course, that elderly Jews in North Miami Beach or Hallandale, many of whom are transplanted northerners, share much in common with native-born non-Jewish whites from northern Florida, unless the unstated assumption is that these groups should and will resist all the political initiatives of Blacks and Hispanics.

UJO presents the mirror image of this case. There the question was whether the state could use racial criteria in districting to avoid a regression of minority political power. The question here is whether it must use such criteria to artificially enhance that power.

The Florida legislature did not evade the command of the Voting Rights Act that Hispanic voters enjoy effective political power. Approximately half of Dade County's residents are Hispanic. Under the the Florida Legislature's rejected plan, half (9 of 18) of Dade County's Florida House of Representatives seats were configured so that Hispanics could select a candidates of their choice, which for the District Court appears to have meant the election of Hispanics.

The differences between the Legislature's plan and that of the

District Court are stark. The Legislature's plan took into account not only the interests of Hispanics, but those of other political, ethnic, class and geographic interests. Appellee's plan subordinated all interests to the enhancement of Hispanic political power. The District Court believed that the VRA required the latter course, and without even pausing to consider interests other than those of African Americans, ordered the Appellee's plan into effect.

The view that fuels these results is that the VRA requires the marshalling of the political strength of minorities to the exclusion of all else but the one person, one vote rule. The assumption underpinning the District Court's interpretation of the VRA Amendments of 1982 is that race and ethnicity are the central organizing features of American

political life -- not class, not geography, not ideology and not any other shared value, common goal or economic interest.

That interpretation of the Act gives weight to only one of Congress' purposes in adopting the 1982 Amendment to the VRA. But there was another purpose -- avoiding an interpretation of the Act which supported claims of proportional representation. This Court should note probable jurisdiction in this case to give plenary consideration to the proper balance between these two purposes.

This view of the VRA adopted by the District Court is, we submit, inconsistent with the language of the statute, congressional intent and the decisions of this Court. It is a view which has nevertheless gained wide currency among those charged with redistricting, if only

to avoid politically painful and financially costly litigation, the obloquy of being accused of racism or, as some have charged, an attempt to cynically enhance their own political power by packing minorities into one district and creating safe all-white districts elsewhere.[4]

I. THIS CASE PRESENTS IMPORTANT QUESTIONS UNDER THE 1982 AMENDMENTS TO THE VOTING RIGHTS ACT

The most important issue before the Court is precisely what standard should be applied to measure challenges to single-

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4. *See Democrats Court Minorities To Counter GOP's Pitch*, Congressional Quarterly (May 4, 1991) at 1103; *Racial Gerrymandering*, New York Times (July 16, 1991), at p. A.18, col.1; *Letter from J. R. Dunne, Assistant Attorney General for Civil Rights to Judith Reed, Esq., dated July 19, 1991* (withholding preclearance from New York city council redistricting); *Brown Says Uncertainty of Jewish Vote Dictated Drawing of District*, Los Angeles Times (September 20, 1992), at p. A.3, col.1.

member districts under the 1982 Amendments to the Voting Rights Act, an issue explicitly left open by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30, 46, n.12 (1986), the Court's only essay to date interpreting the crucial 1982 Amendments. It is an issue that, as Appellants note, has badly divided the lower courts. *See* Jurisdictional Statement at 14-19.

a. The History of the 1982 Amendments

The 1982 Amendments overruled *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), holding that the Voting Rights Act was not violated absent an intent to discriminate. In *Bolden*, a plurality of this Court reasoned that an effects test would be tantamount to requiring proportional representation. The plurality rejected a suggestion by Justice Marshall that those groups which had historically been fenced

out of the political process had a constitutional and statutory right to be represented as groups in the legislature. *Compare* 446 U.S. at 75-80 (plurality opinion of Justice Stewart) with *id.* at 120-24 (dissenting opinion of Justice Marshall).

When other sections of the Voting Rights Act came up for renewal in 1982, notably the preclearance provisions of Section 5 of the Act, there was a broad consensus in the Congress that the decision in *Bolden* made it too difficult to prove a violation of the Act under § 2, in part because *Bolden* was understood to require "smoking gun evidence" of an intent to discriminate. *Cf. Rodgers* v. *Lodge*, 458 U.S. 613 (1982). Many felt that it was unfair to require plaintiffs

to produce such evidence about events that might have occurred decades earlier.[5]

There was, however, consensus about how to remedy the problem *Bolden* was thought to create. Some simply wanted to adopt a straightforward effects test, said to have been the law as laid down in this Court's decision in *White* v. *Register*, 412 U.S. 755 (1973) and a series of decisions from the former Fifth Circuit, including most prominently, *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973). Opponents of amending § 2 in this way argued that an effects test was tantamount to a requirement of proportional representation.

The House of Representatives simply adopted an effects test. *See* House Judiciary Committee, H.R. Rep. No. 97-

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5. For a detailed history of the enactment of the 1982 Amendments, see A. Thernstrom, Whose Vote Counts? (1987).

2227, 97th Congress, 1st Session (1981). The Subcommittee on the Constitution of the Senate Judiciary Committee refused to go along, adopting instead a version of the Act which did not make any change in § 2, leaving intact the intent test of *City of Mobile* v. *Bolden*.

The full Senate Judiciary Committee produced a modified version of § 2 which struck a compromise between the two extreme positions. It explained its provisions in a lengthy report. This compromise version incorporated a modified effects test based largely, if loosely, on *White* v. *Register*, *supra*, but containing an explicit disavowel of any interpretation of the Act which called for finding a violation merely because of an absence of proportional representation. It is this compromise which is embodied in § 2, 42 U.S.C. § 1973.

A key theme running through the Committee report -- which this Court found to be authoritative in *Thornburg* v. *Gingles*, *supra*, 478 U.S. at 43, n.7 -- is that § 2 charges courts with determining not whether a given practice has the effect of denying proportional representation, but whether it "exclu[des] from access to the political process" any racial or ethnic group. S. Rep. 97-417, 97th Cong. 2d Sess. at 33 (1982), reprinted at 1982 U.S. Code, Cong. and Admin. News at 211 (hereafter "S.Rep.").

To that end, the Committee set forth a list of typical factors (which was not to be considered exhaustive) that the courts were to apply in assessing claims that a practice violated the Act:

> 1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to

register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S.Rep. at 28-29, 1982 U.S. Code Cong. & Admin. News at 206-07.

Without more, it is obvious that Congress imposed on the courts a duty far more searching, far more subjective and far more fact specific than a mechanical inquiry into how many majority-minority districts exist, or whether minorities are elected to the legislature to represent

minority populations. What the Congress commanded was a realistic assessment of whether the political process was open to all, or whether racist barriers to full, fair and equal participation in the political process existed.

In keeping with its insistence that an effects test was not the equivalent of a requirement of proportionality, the Committee emphasized the court's obligation to engage in a searching review of all of these factors, and not apply just a mechanical, largely numerical, approach. The statutory disclaimer of any intent to create a right to proportional representation requires at least this much of a limitation on a pure effects approach.

b. The Issues Presented Are Not Resolved by *Thornburg v. Gingles*

The bare fact that this case provides an opportunity to determine a standard for applying § 2 to single-member districts, a question reserved in *Thornburg* v. *Gingles*, is alone sufficient to warrant plenary review. Structural factors of the multi-member district make it uniquely vulnerable to abuse as a means of oppressing minorities. The strongly majoritarian feature of the multi-member district tends to multiply the natural numerical advantage the majority already enjoys.

That advantage, by itself, is not illegitimate. S.Rep. at 33, 1982 U.S. Code, Cong. and Admin. News at 211. But when coupled with evidence that the super-majoritarian effect of multi-member districts has distinct racial overtones

not otherwise justifiable by an important state policy, the VRA requires a moderation of the super-majoritarian effect in the interest of assuring minorities access to political power. The *Thornburg* v. *Gingles* inquiry makes sense in this context.

A single-member district, however, has no extraordinary majoritarian effect. In such a district it is the natural operation of the democratic processes which leads the majority to win, and the minority to lose, elections. That result is not undemocratic. On the contrary, it is the essence of democracy. Of course, if lines are intentionally drawn to deny minorities access to power, the courts are under an obligation to intervene, for no governmental act motivated by invidious racial animus is valid, either under the Voting Rights Act or the Constitution.

Hunter v. *Underwood*, 471 U.S. 222 (1985); *City of Mobile* v. *Bolden*, *supra*; *Gomilion* v. *Lightfoot*, 364 U.S. 339 (1960).

The Section 2 effects test concededly applies to single-member districts. It concededly limits the leguslature's freedom to redistrict as it see fit beyond those restrictions imposed by the Constitution. However, the answer to the question of how it applies to single-member districts does not flow self-evidently from the manner in which it is applied in multi-member districts.

Perhaps an entire jurisdiction (*e.g.* ought to be treated as one large multi-member district, making the *Thornburg* v. *Gingles* methodology relevant in single-member districts redistricting cases as well, but that is not self-evident. In any event, the lower courts are divided on this question, *see* Appellant's

Jurisdictional Statement at 14-19, and this Court is the appropriate forum to authoritatively decide it.

c. The District Court Misapplied the *Thornburg* v. *Gingles* Analysis

Even if *Thornburg* v. *Gingles* provides a rule for decision in a case such as this, it does not follow that the District Court properly applied that rule to this case. We do not repeat all of the points made in the Jurisdictional Statement. Several key points, however, do bear emphasis.

The question of what population figures are relevant, as well as the question of whether the District Court erred in not allowing time for those who would be affected by its remedial plan to submit objectives and alternatives, are both significant issues likely to recur in

VRA cases and hence merit this Court's review. The importance of the first is obvious, and is illustrated by the facts of this case. Because many Hispanic residents of Dade County are not yet citizens, and hence not eligible to vote, it is particularly unclear how to determine whether Hispanic electoral power in Dade County is diluted.

The importance of the second question lies with the fact that, as we noted at the beginning of this brief, redistricting is a zero sum game. One cannot grant one group more power or control of more legislative districts without hurting other groups. By collapsing the question of violation and remedy into one, the District Court avoided considering whether the remedy it imposed unnecessarily trammeled the interests of other groups. Other groups may not have any interest in

the court's consideration of whether a jurisdiction has violated the plaintiff's rights, but they unavoidably do have an interest in the remedy. *See Martin* v. *Wilks*, 490 U.S. 755 (1989); *Firefighters* v. *Cleveland*, 478 U.S. 501 (1980).

In our view, however, as important as these issues are, they are not the central vice of the District Court's judgment. Of the various factors listed by the Senate Judiciary Committee report -- a list the Committee emphasized was not exhaustive -- the District Court relied almost exclusively on three factors highlighted in *Thornburg* v. *Gingles* [28a-30a]. What these three factors have in common is that they emphasize the importance of the creation of majority-minority districts as the acid test of compliance with the Voting Rights Act.

The three factors singled out were the size of the minority population, its geographic compactness and its political cohesiveness. The District Court pared down the Senate Committee list, limiting its analysis to those factors which focussed on the number of Hispanic dominated districts. The Court did not undertake the searching analysis of the availability to Dade County Hispanics of other forms of effective access to the political process. Surely, though, it is possible to be politically effective, even dominating, without constituting a majority of any particular district. The National Rifle Association is a conspicious example.

In taking this statistical shortcut, the District Court substituted what amounted to a thinly-veiled, if objective, proportionality analysis for the more

searching, albeit more subjective, test of political effectiveness which the Congress mandated in adopting the 1982 Amendments.

The District Court's treatment of the last factor in its truncated analysis -- political cohesiveness -- is particularly telling of its vision of minority dominated districts as the test of compliance with the Voting Rights Act.

There was no finding that the various Hispanic subgroups shared a common agenda on the issues which were determinative of votes for members of the Florida House [45a]. There was evidence of substantial disparities between the various subgroups comprising Dade County's Hispanic population. To be sure, there was also contrary testimony that Hispanic groups share common viewpoints on several important issues [46a-47a].

The District Court concluded, without weighing these competing political facts of life, that there were sufficient common interests to satisfy the *Gingles* test [47a].[6] What that might be other than the bare fact of a common language is left unclear and unstated.

Of the remaining factors listed by the Senate Committee, the District Court mentioned only the existence of discrimination. With respect to Hispanics, the court pointed only to

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6. There was also testimony (which the District Court relied on) that despite the fact that Puerto Ricans and Cubans do not share a common party affiliation, they were cohesive because Hispanic Democrats (*i.e.* Puerto Ricans) will vote for Hispanic Republicans (*i.e.* Cubans) over an 'Anglo' candidate [47a]. Contrary to what the District Court believed, this testimony does not prove political cohesiveness. Instead it proves mere racial or ethnic cohesiveness. These cannot be the same thing if Congress' disclaimer of any interest in enacting a principle of proportional representation is to be given any weight. That the trial court conflated the two is indicative of that Court's fundamentally flawed approach to the VRA.

"Hispanic fear of anti-Spanish backlash" [53a], including a reference to an affidavit listing some unspecified number of instances of language-based discrimination against Hispanics.

Significantly, the court did not point to any evidence that these fears were substantially justified. One is left to speculate about how wide-spread this pattern of discrimination was, whether instances of discrimination were redressed promptly when identified, whether discrimination had any measurable impact on the electoral process, and whether it was sufficiently widespread and significant to justify the invalidation of a plan creating nine Hispanic seats in favor of

an even heavier electoral tilt towards Hispanics.[7]

Discrimination is relevant to VRA analysis not because in the manner of original sin it taints a jurisdiction forever. Rather, it should be significant if, and only if, the lingering effects of prior discrimination have a current adverse impact on the ability of minority groups to effectively exercise political power. *See* S.Rep. at 33, 1982 U.S. Code, Cong. and Admin. News at 211. The District Court, however, made no findings tying the existence of prior or current anti-Hispanic discrimination in Dade County to the present inability of that community to presently exercise effective

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7. As further evidence of discrimination, the District Court also pointed to the fact that several counties in Florida were subject to Justice Department preclearance. Significantly, Dade County, whose districting was at issue in this case, was not one of those counties.

political power. Instead it conferred almost talismanic effect on the existence of anti-Hispanic discrimination standing alone.

Equally significant are those factors the District Court did not address. It did not discuss whether there were structural barriers to full and effective minority (Hispanic) participation, such as unusually large districts or a candidate slating process controlled by the white majority. The court below likewise wholly failed to consider whether non-Hispanic office-holders were responsive to Hispanic concerns. It did not inquire whether the invalidated legislative plan served other important governmental interests, including facilitating other groups to exercise effective political power.

These omissions are not mere oversights. Consideration of these

factors would have led the court to consider factors beyond the raw number of majority Hispanic districts. Instead, the District Court would have been forced to look to all the political realities of Dade County, and to have given consideration to other, competing, legitimate political interests.

CONCLUSION

In its earliest encounter with the Voting Rights Act, this Court termed the Act's provisions "stringent remedies." *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). Like most strong medicine, the Act must be used with care. So used, the VRA will cure the lingering effects of electoral discrimination. Improperly used, the Act can perpetuate racial division at the polls by making race the

overriding factor in drawing district lines, to the exclusion of all others.

So applied, the VRA will become a self-fulfilling prophecy of racial and ethnic politics, of increased racial and ethnic parochialism. Candidates will vie to establish that they, not their opponents, will be more loyal to the parochial interests of the district's dominant racial group, be it minority (*i.e.* Black or Hispanic) or white, secure in the knowledge that the VRA endorses that brand of politics. Perhaps some believe that to be the case, but it appears at odds with the Congressional language and intent.

It can hardly be the case that the Congress which passed the Voting Rights Act in 1965 or adopted the Voting Rights Act Amendments of 1982 meant to encourage the racist politics of a David Duke or Gus

Savage by permanently making race and ethnicity the central feature of every legislative district in the country. *See A White Racist's Dream Candidate*, Chicago Tribune (March 22, 1990) (editorial criticizing soon-to-be former Congressman Gus Savage's racist appeals in his majority Black district). Nor should it be too easily inferred that Congress expressed a preference for parochial enclaves over fluid, multi-ethnic districts.

In her *Gingles* concurrence, Justice O'Connor commented on the difficulty in enforcing both an 'effects' test with teeth and a ban on proportional representation. "[T]here [is] an inherent tension between what Congress wished to do and what it wished to avoid." 478 U.S. at 84. *Thornburg* v. *Gingles* did not finally resolve that tension.

This case illustrates the importance of keeping both sides of the Congressional compromise in view -- something we believe the District Court, with its sole focus on maximizing minority political power -- did not do. In any event, the importance of the questions presented merit plenary review so that other courts, and more important, governmental bodies charged by law with redistricting, know what the VRA requires of them.

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No. 92-519

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAWTON CHILES, Governor of the State of Florida, ROBERT A. BUTTERWORTH, Attorney General of the State of Florida, JIM SMITH, Secretary of State of the State of Florida, T. K. WETHERELL, Speaker of the Florida House of Representatives, and PETER R. WALLACE, Chairman of the Reapportionment Committee of the Florida House of Representatives,

Appellants,

v.

MIGUEL DE GRANDY, MARIO DIAZ-BALART, ANDY IRELAND, CASIMER SMERICKI, VAN B. POOLE, TERRY KETCHEL, ROBERTO CASAS, RODOLFO GARCIA, JR., LUIS ROJAS, LINCOLN DIAZ-BALART, JAVIER SOUTO, JUSTO LUIS POZO, ALBERTO CARDENAS, REY VELAZQUEZ, LUIS MORSE, ALBERTO GUTMAN, KAREN E. BUTLER, SGT. AUGUSTA CARTER, JEAN VAN METER, ANNA M. PINELLAS, ROBERT WOODY, GINA HAHN, BILL PETERSEN, TERRY KESTER, MARGIE KINCAID and BROOKS WHITE and the UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Northern District of Florida

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BRIEF AMICI CURIAE OF LEWIS N. DODAK, SPEAKER OF THE MICHIGAN HOUSE OF REPRESENTATIVES, AND GIBSON D. LEWIS, SPEAKER OF THE TEXAS HOUSE OF REPRESENTATIVES, IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

Whether a state-enacted reapportionment plan violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because it does not maximize the electoral opportunities of a class of minority plaintiffs, notwithstanding that the plan provides the minority class with the opportunity to elect representatives in numbers at least equal to the class's proportion of the population?

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INTEREST OF AMICI

The States of Michigan and Texas, like all other States, must reapportion their legislative districts following each decennial census.[1] These States are committed to the letter and spirit of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The present case is important to these *Amici* because it presents an opportunity for this Court to resolve basic Section 2 issues. Without clarification of what Section 2 requires, state legislatures will continue to face an uncertain legal landscape that inevitably affects their ability to exercise one of the most sovereign of all powers—the drawing of political districts.

INTRODUCTION

Following each decennial census, States must reapportion legislative districts.[2] Such legislative redistricting is at the core of a State's sovereignty. This Court has repeatedly held that the business of reapportionment is "a legislative task which the federal courts should make every effort not to preempt." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). *See also Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam); *White v. Weiser*, 412 U.S. 783, 794-95 (1973).

When redistricting, legislatures must accommodate a multitude of competing social, political, regional and ethnic interests. Often, dramatic demographic changes will have greatly altered the population distribution within the State and reshaped traditional political alignments. As this Court has repeatedly noted, "political considerations are inseparable from [this] districting and apportionment" process.[3]

[1] The parties have consented to the participation of *Amici*; letters of consent are on file with the Clerk.

[2] *See Reynolds v. Sims*, 377 U.S. 533 (1964); Fla. Const., Art. III, § 16(c); Michigan Const., Art. 4, § 6; Texas Const., Art. 3, § 28.

Despite these difficulties, *Amici* are committed to ensuring that all citizens have an equal opportunity to participate in the electoral process and elect representatives of choice, as Section 2 of the Voting Rights Act requires. The problem for state legislatures is that neither the text of Section 2, nor the decisions of this Court and lower federal courts interpreting that text, establish a *clear standard* for deciding whether a state legislative reapportionment plan provides equal electoral opportunity.[4] As Chief Judge Tjoflat of the Eleventh Circuit noted, the "amended section 2 means all things to all parties and therefore means nothing at all."[5]

This uncertainty inhibits the ability of States to enact reapportionment legislation in several ways.

First, uncertainty impedes the ability of a State to comply with legal requirements when it redistricts despite good faith efforts to do so. Court review is an inevitable

[3] *Davis v. Bandemer*, 478 U.S. 109, 128 (1986) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973)). *See also White v. Weiser*, 412 U.S. 783, 794-95 (1973).

[4] For example, federal courts are in substantial confusion with respect to the proper standard for analyzing vote dilution challenges to single-member districts. *See, e.g., Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990), in which the Eleventh Circuit *en banc* could not agree on how *Thornburg v. Gingles*, 478 U.S. 30 (1986)—the only decision of this Court which has addressed the appropriate standards to apply to Section 2 challenges since the Voting Rights Act was amended in 1982—should apply to single-member district challenges. *See also Barton v. Shohoen*, 793 F. Supp. 1329 (D.S.C. 1992) (three-judge court) ("it is not entirely clear to what extent *Gingles* applies to . . . single member districts"), *cert. den.*, 61 U.S.L.W. 3334 (U.S. 1992). As discussed in Point I, *supra*, there also is substantial confusion as to whether a State is required to maximize the number of majority-minority districts when it devises a redistricting plan.

[5] *Liberty County*, 899 F.2d at 1035 (Tjoflat, J., concurring).

final result, but state legislatures should have sufficient guidance, in the first instance, to do the job right themselves. As Chief Justice Rehnquist has observed, "legislators who embark on the difficult and politically sensitive task of reapportionment . . . need clear rules for determining whether a particular plan for a particular governmental district is or is not constitutional." *Uvalde Consol. Independent School Dist. v. United States*, 451 U.S. 1002, 1007 (1981) (Rehnquist, J. (now C.J.), dissenting from the denial of certiorari). If legislatures "are to have even a fighting chance of reapportioning themselves within constitutional limits, rather than to be remitted to court ordered redistricting, with all of the additional legal baggage which such plans bring with them, this Court should make every effort to clarify what the Voting Rights Act . . . require[s]." *Id.* at 1007-1008.

Second, that same uncertainty directly affects the deliberative processes of state legislatures attempting to make good faith efforts to comply with Section 2. Because the rules a lower court applies to Section 2 challenges are so uncertain, groups dissatisfied with the process of legislative accommodation can simply opt out of the process and hope to achieve a more favorable allocation of power in court. *See, e.g., Nash v. Blunt*, 797 F. Supp. 1488, 1506 (W.D. Mo. 1992) (three-judge court) (Sachs, J, concurring). This may account, in part, for the failure of many States to enact reapportionment legislation in the wake of the 1990 census.[6]

Third, when—as in this case—a state legislature is able to enact a redistricting plan, the confusion over Section 2 standards inevitably leads to intrusive federal

[6] *See, e.g., Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992) (imposing a plan in Wisconsin because the legislature was unable to enact a plan itself); *Emison v. Growe*, 782 F. Supp. 427 (D. Minn.) (three-judge court) (same in Minnesota), *probable jurisdiction noted sub nom., Growe v. Emison*, 112 S. Ct. 1557 (1992); *Wilson v. Eu*, 286 Cal. Rptr. 280 (S. Ct. 1992) (same in California).

court review. Because the law is so ill defined, a court's discretion during its review of a plan is almost unlimited. This results in exactly the type of "legislative task" preemption that this Court has repeatedly deemed improper:

> [it] too much embroil[s] the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from the legislative halls.

Davis v. Bandemer, 478 U.S. 109, 133 (1986) (plurality opinion).

ARGUMENT

I. RESOLUTION OF THE STANDARDS WHICH GOVERN A SECTION 2 VOTE DILUTION CHALLENGE IS REQUIRED.

Section 2 of the Voting Rights Act is intended to ensure that laws directly affecting the ability of a citizen to participate in the electoral process—such as reapportionment statutes—are not drafted or implemented in a discriminatory manner.[7] Section 2 thus prohibits imposition of any reapportionment plan that causes a class protected by the Act to "have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice." 42 U.S.C. § 1973(b).

The difficulty for state legislatures attempting to promote the fundamental principles of the Act is that it is unclear exactly how the requisite "opportunity" should be gauged when the electoral practice at issue is the drawing of single-member districts.[8] As Justice O'Con-

[7] *See generally* S. Rpt. No. 97-417, 97th Cong., 2d Sess. at 6 (1982), *reprinted in* 2 U.S. Code & Admin. News 177, 183 (1982).

[8] If the electoral practice at issue is a bar to minority voter registration or some other device that impinges upon the ability of minority citizens to exercise their right to vote, it is much easier

nor recognized, "in order to decide whether [a reapportionment plan] has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." *Thornburg v. Gingles*, 478 U.S. 30, 88 (1986) (O'Connor, J. concurring, joined by Burger, C.J., Rehnquist, J. (now C.J.) and Powell, J.). *See also Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002, 1012 (1984) (Rehnquist, J. (now C.J.) dissenting from summary affirmance) ("the phrase [vote dilution] itself suggests a norm with respect to which the fact of dilution may be ascertained"); *Chisom v. Roemer*, 111 S. Ct. 2354, 2375 (1991) (Scalia, J., joined by Rehnquist, C.J. and Kennedy, J., dissenting).

Gingles enunciated a three-part test for establishing a *prima facie* Section 2 challenge to a multimember district plan.[9] The *Gingles* Court, however, declined to address

to gauge equal opportunity because any such bar would by definition afford to minority voters "less opportunity than other members of the electorate to participate in the political process." *See generally* S. Rpt. No. 97-417, *supra*, at 183. A multi-member district plan also may raise more straight forward issues because the multi-member district device itself may submerge the minority vote. *See, e.g., Connor v. Finch*, 431 U.S. 407 (1977). If that type of submergence has occurred, then, arguably, the vote of a member of a minority group has less weight than the vote of a member of the majority because the majority voter has the opportunity to elect multiple candidates while the minority voter has no effective opportunity to elect any candidates. *Cf. Reynolds v. Sims*, 377 U.S. 533 (1964). However, in the single-member district context, no voter has the opportunity to elect more than one candidate. In this context, it necessarily becomes much more difficult to gauge when the opportunity to elect a single candidate has degenerated into such a limitation on the ability to participate that a Section 2 violation should be deemed to have occurred.

[9] The first *Gingles* factor requires a determination that the minority population is sufficiently large and geographically compact to permit the creation of single member districts where the minority can elect candidates of choice. The second *Gingles* factor requires

the proper standard for assessing single-member district challenges. *See id.* at 46, n.12. State and federal courts attempting to apply *Gingles* have been extremely uncertain as to what *Gingles* requires in any context,[10] and have been particularly uncertain as to whether, and how, the *Gingles* standards apply to challenges to single-member district-plans. *See, e.g.*, Brief Amici Curiae On Behalf Of Congressman Louis Stokes, *et al.* at 12-15, *Voinovich v. Quilter*, S. Ct. No. 91-1618 (Sept. 11, 1992) (arguing that the three *Gingles* factors should not apply to a challenge to a single-member district plan); *Burton v. Sheheen*, 793 F. Supp. 1329 (D.S.C. 1992) (three-judge court) ("it is not entirely clear to what extent *Gingles* applies to . . . single member districts"), *cert. den.*, 61 U.S.L.W. 3334 (July 21, 1992).

The lower court in this case, for example, held that the districts in the single-member district reapportionment plan at issue violated Section 2 "in that the plaintiffs have shown that more . . . districts may be drawn" than were drawn. Tr. VIII, 82. The court believed that this evidence proved a Section 2 violation because—once political cohesion and racially polarized voting are shown —Section 2 requires nothing more than a demonstration that additional districts could have been, but were not, drawn. Relying on this rule, the court rejected the State's defense that, because the challenged plan provided each protected group with the opportunity to elect a pro-

a determination that the minority population is politically cohesive. The third *Gingles* factor requires a determination that, as a result of racially polarized voting, the white majority is usually able to defeat Hispanic candidates of choice. *Gingles*, 478 U.S. at 49-50.

[10] *Cf. Solomon v. Liberty County, Florida*, 899 F.2d 1012, 1017 (11th Cir. 1990) (*en banc*) (proof of the three *Gingles* factors is both necessary and sufficient to prevail on a Setcion 2 vote dilution claim) (Kravitch, J., concurring); *with id.* 1035-36 (proof of the three factors is necessary but then court must analyze the totality of the circumstances) (Tjoflat, J., concurring).

portionate number of candidates of choice, the asserted Section 2 claim must fail.

The approach taken by the district court in this case conflicts directly with two recent decisions—*Baird v. Indianapolis*, 976 F.2d 357 (7th Cir. 1992) (Easterbrook, J.), and *Nash v. Blunt*, 797 F. Supp. 1488 (W.D. Mo. 1992) (three-judge court). Both courts specifically rejected the maximization requirement imposed by the district court in this case. In *Nash*, the court explicitly held that "though the plaintiffs have proven more [minority] districts could have been drawn [in the single-member district plan] . . . this fact does not prove the . . . . plan violates the Act." *Nash*, 797 F. Supp. at 1496. In the recent *Baird* decision, the Seventh Circuit also rejected a maximization requirement, holding that "[u]nless black voters fare poorly compared with white voters in achieving their objectives (the election of the candidates they prefer), they have not stated a claim under [Section 2]." *Baird*, slip op. at 6. The *Baird* and *Nash* courts dismissed Section 2 challenges based on demonstrations that the challenged plans assured equal electoral opportunity.[11]

The widespread confusion as to the meaning of Section 2 in the single-member district context, and the direct conflict between the ruling below and the *Nash* and *Baird* decisions, makes clear that definitive guidance from this Court is needed.[12]

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[11] Whether, and to what extent, a jurisdiction must attempt to maximize the number of minority districts also is a critical issue in many of the pending redistricting cases in the lower courts. A key ssue in the on-going Texas legislative and congressional redistricting litigation, for example, is whether the State failed to maximize the number of majority-minority districts in its recently enacted plans. *Terrazas v. Slagle*, No. A-91-CA-426 (W.D. Tex.).

[12] The Voting Rights Act cases already before the Court this term do not present the opportunity to resolve these core issues. *See Quilter v. Voinovich*, 794 F. Supp. 760 (N.D. Ohio 1992) (three-judge court), *probable jurisdiction noted*, 112 S. Ct. 2299 (1992) (primary issue presented relates to whether a legislature must find that a prior redistricting plan was in violation of Section 2 prior to taking affirmative steps to establish a minority-majority district in a subsequent plan); *Emison v. Growe*, 782 F. Supp. 427 (D. Minn.) (three-judge court), *probable jurisdiction noted sub nom., Growe v. Emison*, 112 S. Ct. 1557 (1992) (primary issues presented relate to federalism and federal court/state court comity in the reapportionment context).

II. THE SECTION 2 STANDARDS APPLIED BY THE LOWER COURT IN THIS CASE MUST BE REJECTED.

This Court has recognized that a wide array of interests and policies must be a accommodated when a State weaves the compromises that will result in an acceptable reapportionment plan.[13] These legitimate considerations include "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent" office holders. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). They also may include the fair allocation of political power among a State's diverse political, ethnic and racial communities. *See United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144, 167 (1977); *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973).

The standards applied by the lower court in this case, however, prevent a State from even considering such factors. As discussed above, the lower court believed that—if political cohesion and racially polarized voting are demonstrated—the failure to draw the maximum number of minority districts in a single-member district reapportionment plan is tantamount to a violation of

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[13] The Court has directed that a court must consider this compromise process when reviewing State action: "[i]n giving substance to the presumption of validity to which the [Florida redistricting plan] is entitled, it is important to remember that at every stage of its development it has constituted a "rough accommodation" of interests in an effort to arrive at practical and workable solutions." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 55 (1973) (citations omitted).

Section 2. The district court reached this conclusion notwithstanding undisputed evidence that the minority group asserting the challenge constituted the majority of the voting age population in a proportionate number of house districts included in the State of Florida plan for the Dade County area—the area in which the group alleged the plan impermissibly diluted its voting strength.

In holding that maximization is required, the lower court did not even find it appropriate to evaluate the claims of two different protected classes simultaneously. This led the court to an anomalous result in its evaluation of the Florida state senate district plan: It found that both Hispanic and African-American plaintiffs had established Section 2 violations but that neither were remediable because the allocation of an additional district to either group would result in the loss of a district by the other group. Therefore, the court concluded that the reapportionment scheme it considered to be the best available nevertheless violated Section 2.

The maximization requirement imposed by the lower court must be rejected for two reasons.

First, such a requirement vitiates Congress's mandate that a court consider the "totality of the circumstances" when evaluating a Section 2 challenge. 42 U.S.C. § 1973. The lower court's exclusive focus on the treatment of one group in a redistricting plan without reference to the treatment of other groups and interests in that plan is improper because it does not permit an assessment of whether members of the protected class will have "less opportunity *than others* to participate in the electoral process and to elect representatives of their choice." *Id.* (emphasis added).

Second, the lower court's maximization requirement cannot be reconciled with the Section 2(b) proviso "[t]hat nothing in [Section 2] establishes a right to have members of a protected class elected in numbers equal to

their proportion in the population." 42 U.S.C. § 1973(b). In both *Baird v. Indianapolis*, *supra*, and *Nash v. Blunt*, *supra*, the courts relied on this proviso to dismiss Section 2 challenges because the plans at issue afforded the complaining minority groups proportional representation in all of the areas in which those plans were challenged. *Baird*, slip op. at 6; *Nash*, 797 F. Supp. at 1496. As Judge Easterbrook put it in the recent *Baird* decision, this proviso must mean not only that "a minority cannot win by proving that it is underrepresented, then resting . . . [it] also implies that [minorities] who have influence proportional to their numbers do not state a claim under" Section 2. *Baird*, slip op. at 6.

Judge Easterbrook's conclusion comports with the holding in *Gingles* that the Act is not violated where minority voters in a region can consistently elect representatives of their choice in proportion to minority population levels in that region. *See Gingles*, 478 U.S. at 77 (Brennan and White, JJ.) ("persistent proportional representation is inconsistent with [the] allegation that the ability of [minority] voters to elect candidates of their choice is not equal to that enjoyed by the White majority"); *id.* at 102 (O'Connor, J., Burger, C.J., Rehnquist, J. (now C.J.), and Powell, J.). *Accord Nash v. Blunt*, 797 F. Supp. at 1497-98 (proof of "persistent proportional representation" should defeat a Section 2 vote dilution claim); *Id.*, 797 F. Supp. at 1507 (Sachs, J., concurring) (no Section 2 violation because "a contrary ruling would force redistricters to grant more than proportional representation" to minority voters).

Thus, Section 2 cannot reasonably be read to require a minority group be allocated the maximum possible number of districts in a reapportionment plan, and the district court's conclusion that Section 2 does require such a result should be rejected.

Nor is it possible to justify the district court's ruling based on a theory that the state "intended" a discrimina-

tory result because it failed to maximize the number of minority-majority districts. A court evaluating whether a redistricting plan intentionally discriminates against a protected class must consider "the jurisdiction as a whole" because "States attempt to comply with the Voting Rights Act by creating conditions conducive to success by minorities throughout [that] jurisdiction." *Baird*, slip op. at 4. If the challenged plan provides the protected class an equal electoral opportunity by ensuring that it will have the opportunity to elect a proportionate number of candidates, that evidence cannot support an inference of intentional discrimination. *See Mobile v. Bolden*, 446 U.S. 55, 72 and n.17 (1980) (plurality opinion).

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in Appellants' Jurisdicitonal Statement, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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No. 92-519

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAWTON CHILES, Governor of the State of Florida, ROBERT A. BUTTERWORTH, Attorney General of the State of Florida, JIM SMITH, Secretary of State of the State of Florida, T. K. WETHERELL, Speaker of the Florida House of Representatives, and PETER R. WALLACE, Chairman of the Reapportionment Committee of the Florida House of Representatives,

Appellants,

v.

MIGUEL DE GRANDY, MARIO DIAZ-BALART, ANDY IRELAND, CASIMER SMERICKI, VAN B. POOLE, TERRY KETCHEL, ROBERTO CASAS, RODOLFO GARCIA, JR., LUIS ROJAS, LINCOLN DIAZ-BALART, JAVIER SOUTO, JUSTO LUIS POZO, ALBERTO CARDENAS, REY VELAZQUEZ, LUIS MORSE, ALBERTO GUTMAN, KAREN E. BUTLER, SGT. AUGUSTA CARTER, JEAN VAN METER, ANNA M. PINELLAS, ROBERT WOODY, GINA HAHN, BILL PETERSEN, TERRY KESTER, MARGIE KINCAID and BROOKS WHITE and the UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Northern District of Florida

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BRIEF AMICI CURIAE OF FLORIDA STATE REPRESENTATIVES CYNTHIA CHESTNUT, DOUGLAS JAMERSON, ALFRED LAWSON, WILLIE LOGAN AND ALZO REDDICK IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

1. Whether a state-enacted reapportionment plan violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because it does not maximize the electoral opportunities of a class of minority plaintiffs, notwithstanding that the plan provides the minority class with the opportunity to elect representatives in numbers at least equal to the class's proportion of the population?

2. May a federal court impose a reapportionment plan as a remedy for a Voting Rights Act violation without affording the State any opportunity to devise an acceptable remedial plan, especially when the court-ordered plan unnecessarily trenches on fundamental state policy choices?

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IN THE
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INTEREST OF AMICI

Amici are African-American members of the Florida legislature and members of the Florida Caucus of Black State Legislators ("Black Caucus").[1] *Amici* have a unique stake in this case: they are among the class of intended beneficiaries of the protections of Section 2 of the Voting Rights Act, and, as legislators, they played a primary role in enacting the reapportionment plan that has been challenged in this litigation as violative of Section 2. In this dual role, *Amici* championed, during the reapportionment process itself, the equal electoral opportunity principles upon which Section 2 is grounded. *Amici* consider the enacted plan to be an ideal embodiment of these Section 2 principles. However, the district court's judgment in this case threatens to circumvent this legislative process and to negate the gains made by the African-American communities in the Dade County area in the State's reapportionment plan.

INTRODUCTION

Redistricting is an inherently political process. The Court has been particularly sensitive to this inescapable reality: "Politics and political considerations are inseparable from districting and apportionment."[2] These "considerations" include a multitude of competing social, political, regional and ethnic interests. Such interests must often be balanced in the context of dramatic demographic changes that have virtually reshaped a State. At the same time, no political interest can ever be permitted to violate the voting rights of a State's citizens. A legislature's task, therefore, is to protect legal rights while, where appropriate, resolving political disputes that affect redistricting.

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[1] The parties have consented to the participation of *Amici*; letters of consent are on file with the Clerk.

[2] *Davis v. Bandemer*, 478 U.S. 109, 128 (1986) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973)).

To fully appreciate how such interests were balanced in the Florida reapportionment plan, an initial understanding of the process which culminated in that plan, and the Black Caucus's role in that process, is essential. Historically, African-Americans had been effectively barred from participation in the political process in Florida.[3] However, the reapportionment plan at issue in this case was the product of an extremely open political process in which every affected interest and group was able to actively participate.

After the 1990 census, the Florida legislature established bi-partisan House and Senate committees to propose a plan for reapportionment of the state legislature. Before arriving at a final reapportionment proposal, the committees held 34 public hearings. Hispanic members of the Florida legislature, including Representative Miguel De Grandy, the principal private plaintiff in this case, served on these committees and played an active role in the hearing process.[4] These Hispanic representatives proposed redistricting plans in the legislature and these plans were the subject of extensive debate.[5] Community groups and other interested organizations participated actively as well.

Members of the Black Caucus also served on these committees and played a particularly active role throughout the redistricting process. They were assisted in the performance of their redistricting duties by African-American organizations from across the State, including the Florida chapter of the NAACP. In fact, the House

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[3] App. 78a.

[4] Testimony of M. De Grandy, Tr. II, 138-139.

[5] *See* Testimony of W. Logan, Tr. VII, 79; Testimony of M. De Grandy, Tr. IV, 20-42. In fact, the remedial plan imposed by the district court was a modified version of a plan proposed by Hispanic representatives during the reapportionment process but ultimately rejected by the legislature during that process. D. Ct. Slip Op. at 67-73, App. 68a-72a.

redistricting plan initially proposed by the Black Caucus was the basis for the final Senate Joint Resolution 2-G ("SJR 2-G"). At trial, State Representative Willie Logan, the Chairman of the Black Caucus, testified that "96-98 percent of the configuration of the districts within the joint resolution were the ones that were proposed by the black caucus." Tr. VII, 75. Similarly, the SJR 2-G Dade County House districts were the districts of choice of the NAACP.[6]

The Black Caucus was particularly focused on the Dade County districts—the districts at issue in this case. Twelve separate Dade County African-American organizations worked with the Black Caucus to develop the Dade County districts eventually proposed by the Black Caucus.[7] Representative Logan testified at length about the intensely practical factors that were considered in formulating these proposed districts. For example, it was imperative that districts not cross the boundary between Dade County and Broward County. Representative Logan explained that Dade County is an essentially unified community that is completely distinct from Broward County.[8] Representing constituents in a district that included communities in both Dade and Broward counties would thus be much more difficult than representing constituents in a district wholly within just one county.[9] He also explained that a district straddling the boundary between the two counties would be in two different media markets (Miami and Fort Lauderdale), and that campaigning in such a district would be prohibitively expen-

[6] Testimony of W. Logan, Tr. VII, 108; Stipulated testimony of L. Russell, Tr. VII, 139, 140.

[7] Testimony of W. Logan, Tr. VII, 77, App. 201a.

[8] The Black Caucus also devoted a great deal of attention to the Broward County districts. In so doing, its members worked with a group of African-American organizations completely distinct from those involved in developing the Dade County districts. Testimony of W. Logan, Tr. VII, 89.

[9] Testimony of W. Logan, Tr. VII, 81.

sive.[10] For similar reasons, it also was important to try to conform to the greatest degree possible with the eight neighborhood areas served by the Miami Herald, the preeminent newspaper in Dade County.[11] The districts that were drawn also respected government units such as the areas established by the Florida Community Development Corporation "because those are established communities of interest that have worked together, and the boundaries are defined . . . by citizen data and based upon the income level and the distress in the area." Testimony of W. Logan, Tr. VII, 83.

The Black Caucus—and other members of the Legislature—also wanted to achieve a fair allocation of political power in the Dade County area. Representative Logan emphasized that: "we fe[lt] that we should come as close to proportionate representation as possible and that there should be opportunity provided not just for blacks and Hispanics but for all people to elect candidates of their choice." [12]

The members of the legislature took cognizance of all of these parameters—as well as of the reapportionment plan proposed by the Black Caucus—in its work to enact a viable redistricting plan.[13] Representative Logan explained that "[i]n this process, disagreement is part of

[10] Testimony of W. Logan, Tr. VII, 80-81. Moreover, preservation of the integrity of the boundary between Dade and Broward counties also was of critical importance to Anglo legislators from both counties. *See* Testimony of P. Wallace, Tr. VII, 165.

[11] Testimony of W. Logan, Tr. VII, 81.

[12] Testimony of W. Logan, Tr. VII, 109.

[13] Some members of the Hispanic delegation, including Representative De Grandy, did not accept the basic proportionality premise and refused to participate in the legislative negotiation process. Representative Logan "attempted to sit down with the Hispanic members and come to an agreement on the number of seats" but "[t]heir attitude [was] we want all or we want nothing." Tr. VII, 99.

democracy, we always have disagreements, but what we do learn is to respect each other's disagreements and learn to work with each other." [14] After lengthy legislative negotiations, the process successfully culminated in the enactment of a plan that enhances the opportunities of minority groups to elect candidates of choice by increasing the number of African-American House districts from six to eight overall and the number of Dade County Hispanic House districts from seven to nine.[15] The Black Caucus believes that this plan "fairly provides for the opportunity for . . . whites, Hispanics and blacks to have representation [and] respects when possible county boundaries and other points of interest in accomplishing that objective." [16]

The district court completely ignored this careful plan to protect equal rights and to balance political objectives and the ability of all impacted groups to participate in the balancing process when it concluded that SJR 2-G violates Section 2. Instead of examining the rich texture of the completed legislation, the district court concluded that the legislature had failed to draw every Hispanic district that could have been drawn. By so holding, the district court exceeded the requirements of Section 2 and impermissibly pre-empted "a legislative task" in direct contravention of this Court's express instructions. *See Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *White v. Weiser*, 412 U.S. 783, 794-95 (1973).

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[14] Testimony of W. Logan, Tr. VII, 87.

[15] App. 111a-112a. In addition, SJR 2-G created seven African-American influence districts and five Hispanic influence districts across the State. *Id.*

[16] Testimony of W. Logan, Tr. VII, 113.

ARGUMENT

I. THE DISTRICT COURT'S FAILURE TO EVEN CONSIDER THE STATE POLICIES THAT WERE INCORPORATED INTO THE STATE'S LEGISLATIVE REDISTRICTING PLAN OR THE IMPACT OF THAT PLAN VIOLATES THE STANDARDS THAT THIS COURT HAS ESTABLISHED FOR ASSESSING VOTE DILUTION CHALLENGES.

In order to better serve legal and political interests, the Florida legislature sought to redistrict the State to achieve a fair allocation of political power. This Court has specifically endorsed such an approach: "judicial interest should be at its lowest ebb when a State purports fairly to allocate power . . . in accordance with . . . voting strength and, within quite tolerable limits, succeeds in doing so." *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973). *See also United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144, 168 (1977).

The district court, however, made no effort even to address the fact that the redistricting plan afforded Hispanic voters proportional representation in the Dade County area. Instead, the district court simply assessed how many Hispanic districts could have been created in Dade County. The district court's imposition of such a maximization requirement in this case is clearly erroneous.

Nothing in the Voting Rights Act can be read to require maximization of the number of majority-minority districts. "Although there is significant dispute concerning what constitutes undiluted minority voting strength, 'there is substantial doubt that Congress intended undiluted minority voting strength to mean maximum feasible minority voting strength.'" Brief Amici Curiae On Behalf Of Congressman Louis Stokes, *et al.* at 21, *Voinovich v. Quilter*, S. Ct. No. 91-1618 (Sept. 11, 1992) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 94 (1986) (O'Connor, J. concurring)).

Instead, when a court addresses a Section 2 claim, "[t]he 'right' question . . . is whether '*as a result of the challenged practice or structure* plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'" *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (quoting S. Rpt. No. 94-917, 97th Cong., 2d Sess. at 28 (1982), *reprinted in* 1982 U.S. Code & Admin. News 177) (emphasis added). To "answer this question, a court must assess the impact of *the contested structure or practice* on minority electoral opportunities." *Id.* (emphasis added).

In this case, however, the district court concluded that SJR 2-G violates Section 2 simply because "the plaintiffs have shown that more . . . districts may be drawn . . ." than were drawn. D. Ct. Slip Op. at 19 (quoting Tr. VIII-83), App. 24a. In so holding, the district court completely failed to examine the challenged plan itself and the State interests that were reflected in that plan. This exclusive focus on the treatment of one group in a redistricting plan without reference to the treatment of other groups and interests in that plan is improper because it does not permit an assessment of whether members of the protected class will have "less opportunity *than others* to participate in the electoral process and to elect representatives of their choice." 42 U.S.C. § 1973 (emphasis added).

Moreover, any inquiry to determine whether a reapportionment plan denies equal opportunity to a class of voters must include an assessment of the "totality of the circumstances," 42 U.S.C. § 1973(b), before a Section 2 violation can be decreed. A significant aspect of such an inquiry involves a determination of whether members of a minority group have been "hinder[ed] in their ability to participate effectively in the political process." *Gingles*, 478 U.S. at 45 (quoting S. Rpt. at 28-29).[17] Indeed,

[17] This Court has often stated that "it is important to remember that at every stage of [a system's] development, it has constituted a 'rough accommodation' of interests in an effort to arrive at practical and workable solutions." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 55 (1973) (quoting *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913)).

several of the express factors identified in the Senate Report accompanying the 1982 amendments to Section 2 as relevant in the "totality of the circumstances" assessment specifically focus on the ability of members of minority groups to participate effectively in the political process.[18] But the district court did not even consider the open process that resulted in SJR 2-G—a plan proposed and endorsed by the Black Caucus in a process in which Hispanic representatives actively participated.[19]

Another significant component of such an inquiry must include an evaluation of "the state interests . . . served by the particular districts as they were created by the legislature." *Davis v. Bandemer*, 478 U.S. 109, 142 (1986). But again the district court did not even attempt to conduct such an evaluation in this case. Thus, the court completely failed to assess the adequacy of the Dade County minority-majority districts that were created in SJR 2-G, the legal significance that the number

[18] These factors include "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;" the exclusion of members of the minority group from candidate slating processes; and "the extent to which the State or political subdivision has used . . . voting practices or procedures that may enhance the opportunity for discrimination against the minority group." *Id.* at 36.

[19] Any contention that SJR 2-G was employed as a purposeful device to further racial discrimination must be rejected for the same reason because the plan was "developed through an open and democratic process free from bias or prejudice and any intent to discriminate against the plaintiff class." *Williams v. Orange County*, 783 F. Supp. 1348, 1356 (M.D. Fla. 1992) (rejecting a similar 14th Amendment vote dilution claim).

of African-American and Hispanic districts was greatly enhanced in the plan and that nine Dade County Hispanic districts were created in SJR 2-G (a number precisely proportional to the Hispanic community's population in Dade County), and the other State policy choices that were reflected in SJR 2-G. *See* D. Ct. Slip Op. at 23-53, App. 28a-55a.

The court instead believed that the challenged plan and the process in which it was derived were irrelevant because—once political cohesion and racially polarized voting are shown—Section 2 requires nothing more than a demonstration that additional districts could have been, but were not, drawn. This standard effectively imposes a requirement of "maximization" and excludes the consideration of all other factors because any failure to draw additional minority districts that could be drawn will violate Section 2 so long as racially polarized voting exists. Utilization of such a benchmark "invit[es] attack on minor departures from some supposed norm" which this Court has steadfastly refused to permit because it "too much embroil[s] the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls." *Davis v. Bandemer*, 478 U.S. at 133. In *Gaffney v. Cummings*, this Court similarly derided such a mechanistic approach:

> An unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge . . . other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.

Gaffney v. Cummings, 412 U.S. at 749.

Finally, while "[t]here is no doubt that there may be other reapportionment plans . . . that would have different political consequences and that would also be constitutional," *Gaffney v. Cummings*, 412 U.S. at 754, a district court's role is not to implement what it considers to be the best plan, but merely to determine whether the plan enacted by the State comports with Section 2 and constitutional requirements. By requiring maximization even when a plan does not violate these requirements, the district court has implemented its own policy priority. This it cannot do. "District lines are rarely neutral phenomena. . . . The reality is that redistricting inevitably has and is intended to have substantial political consequences." *Id.* at 753. And it is the States who must be permitted to "seek, through compromise or otherwise, to achieve the political or other ends of the State, its constituents, and its officeholders." *Id.* at 754.[20] The federal courts "themselves must [not] make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan." *Id.* at 749. Yet that is exactly what the district court attempted to do in this case when it invoked the maximization standard without even assessing the impact of the challenged plan on affected minority groups or the State policy objectives embodied in that plan. In so doing, the court eliminated by judicial fiat many of the political choices that had been championed by the Black Caucus and incorporated into SJR 2-G. Because there was no legitimate basis on which to predicate a finding that SJR 2-G violated Section 2, the district court's liability determination should be reversed.

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[20] By ultimately refusing to fairly consider compromise proposals during the legislative process which resulted in the enactment of SJR 2-G, the Hispanic delegation essentially opted out of this process in favor of a court based challenge. However, groups dissatisfied with the process of legislative accommodation should not be permitted to negate that process by refusing to participate and then running to court to complain about the result. *See, e.g., Nash v. Blunt*, 797 F. Supp. 1488, 1506 (W.D. Mo. 1992) (three-judge court) (Sachs, J., concurring).

II. THE REMEDY IMPOSED BY THE DISTRICT COURT FURTHER ILLUSTRATES THE DISTRICT COURT'S MISPERCEPTION OF THE SCOPE OF ITS AUTHORITY IN A SECTION 2 CASE.

A "district court's modifications of a state [redistricting] plan [must be] limited to those necessary to cure any constitutional or statutory defect." *Upham v. Seamon*, 456 U.S. 37, 43 (1982). A district court must therefore "defer to the legislative judgments the [original] plan[] reflect[s] to the maximum extent feasible." *Id.* at 40-41. *See also White v. Weiser*, 412 U.S. 783, 795 (1973). Such deference is mandated because "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978).

Yet, to create two additional Hispanic majority districts in Dade County, the modified De Grandy plan imposed by the district court substantially reconfigures all 31 House districts in South Florida. The remedial plan reaches far beyond Dade County, and reshapes districts in areas that were not at issue in this case and for which no evidence of a Section 2 violation was even submitted. In so doing, the remedial plan unnecessarily ignores the important traditional boundary between Dade and Broward counties whose preservation was of such critical importance to the Black Caucus. In SJR 2-G, only District 101 crosses the boundary between Dade and Broward counties. This district includes 105,140 persons in Broward County and only 2,260 persons in Dade County. In the court-ordered plan, three districts cross the boundary: District 101, 102 and 110. District 102 is an African-American district in the remedial plan but African-Americans are divided in that district with 59,794 residing in Dade County and 9,233 residing in Broward County. This is exactly what the Black Caucus sought to avoid.[21]

[21] *See* Text at 4-5, *supra*; Testimony of W. Logan, Tr. VII, 81.

The remedial plan also ignores other traditional political divisions that the legislature and the Black Caucus sought to preserve. It combines African-American communities in Broward and Dade counties that do not have traditional ties. Moreover, as discussed above, it is more expensive for candidates to run campaigns and effectively represent districts that have residents in both Dade and Broward counties. In addition to combining disparate communities, the court's remedial plan unnecessarily divides traditional African-American communities including Opa-locka, Richmond Heights and Carol City.

Finally, the remedial plan amounts to a partisan gerrymander that significantly changes the political balance in the State.[22] At bottom, it may be that one of the primary impetuses behind the plaintiffs' challenge was to achieve an alteration of the partisan political balance in the State of Florida that they were unable to achieve in the legislature. Hispanic voters in South Florida—especially voters with a Cuban heritage—traditionally align themselves with the Republican Party while African-American and Anglo voters in South Florida tend to identify themselves with the Democratic Party.[23] The remedial plan the Hispanic and Republican plaintiffs succeeded in having the district court impose implemented their political agenda—Republicans gained four seats in the court's remedial plan increasing the districts in which they comprised a voting majority from

[22] *See* Affidavit of K. Brace (filed July 2, 1992), App. 154a.

[23] *See* Testimony of M. De Grandy, Tr. IV, 42; Testimony of D. Moreno, Tr. II, 102. *See also 1982 State Legislative & Congressional Districts*, Fla. Hse. Comm. on Reapportionment, Sept. 1991 (the "Malapportionment Report") (entered into the district court record by the De Grandy plaintiffs in De Grandy Request For Judicial Notice, Item 8 (filed April 17, 1992) and Order entered April 22, 1992 (granting same)).

10 to 14.[24] But such an objective is not redressable in a Section 2 challenge—Section 2 protects the rights of members of racial or ethnic groups but not the rights of members of political parties. *See* 42 U.S.C. § 1973; *Whitcomb v. Chavis*, 403 U.S. 124, 152 (1971) (African-Americans who lose elections not because of their race but because of their political party affiliation are not entitled to Section 2 relief). *See also Turner v. Arkansas*, 784 F. Supp. 553, 563 (E.D. Ark. 1991) (three-judge court) (noting a similar phenomenon in an Arkansas reapportionment challenge), *aff'd*, 112 S. Ct. 2296 (1992).

Thus, the partisan remedial plan hastily imposed by the district court—a plan which unnecessarily redraws districts far beyond the area of the alleged Section 2 violation and which completely trenches upon the State policy objectives reflected in the original plan—should, at a minimum, be vacated.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in Appellants' Jurisdictional Statement, the Court should note probable jurisdiction of this appeal.

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November, 1992

[24] Moreover, the district court's remedial plan places 19 incumbents into districts with other incumbents. Fourteen of these incumbents are Democrats. In one district in the remedial plan (District 101), three Democratic incumbents are paired in a strong Democratic district. In another district in the remedial plan (District 93), two Democratic incumbents are paired with one Republican incumbent in a strong Republican district. In all, the remedial plan could result in the defeat of at least seven and possibly as many as 11 Democratic incumbents. Affidavit of K. Brace (filed July 2, 1992), App. 154a.

Nos. 92-519, 92-593, 92-767

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BOLLEY JOHNSON, *et al.*,
Appellants,
v.
MIGUEL DE GRANDY, *et al.*,
Appellees.

MIGUEL DE GRANDY, *et al.*,
Appellants,
v.
BOLLEY JOHNSON, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,
v.
STATE OF FLORIDA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

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DISTRICT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1992		RECEIPT #55987
1/14	1	COMPLAINT
	3	MOTION . . . for appointment of three judge court
	4	MOTION . . . to expedite proceedings summons issued and handed to runner at counter. file reference to WS
1/20	14	DESIGNATION OF THREE-JUDGE COURT . . . Chief Judge Tjoflat cc: Rumberg and Meros
1/23	15	FIRST AMENDED COMPLAINT . . . Pltf's declaratory judgment and injunctive relief. ref. WS
1/28	18	MOTION TO DISMISS . . . deft Chiles and Smith ref. WS
2/4	27	MOTION TO DISMISS . . . Margolis and Gordon's pltf's first amended complaint and motion to vacate the order appointing a three Judge Court and Supporting memo of law. ref WS
2/5	32	MOTION TO DISMISS . . . deft's Wetherell and Wallace. ref WS
2/20	41	ORDER . . . EOD 2/20 cc: Rumberger, Meros and Waas 1. Deft's motion to dismiss (doc 18, 27 & 32) are GRANTED w/o prejudice to amend. Pltf's shall have fifteen days to amend. The then defts shall have ten days to file their respective responsive pldgs.
3/9	44	SECOND AMENDED COMPLAINT . . . pltfs for declaratory judgment and injunctive relief ref WS
3/20	46	MOTION . . . defts Wetherell and Wallace to Dismiss Second Amended complaint/motion for more definite statement. ref WS

DATE	NR.	PROCEEDINGS
	47	MOTION . . . Margolis and Gordon's to dismiss pltf's second amended Complaint and Supporting memo of law. ref WS
3/20	48	MOTION . . . Smith's, Chiles & Butterworth to dismiss second Complaint. ref WS
3/27	56	ORDER . . . (3 JUDGE PANEL) EOD 3/27 cc: Rumberger, Meros, Waas & Peters DENYING MOTIONS TO DISMISS AND SETTING EXPEDITED SCHEDULE. _Defts shall file answers to 2nd amended complaint by 3/31/92. Parties to submit 6 names for special masters by 4/3/92. (see order)
3/31	61	ANSWER . . . Deft's Margolis and Gordon's to pltf's second amended complaint for declaratory judgment and injunctive relief. ref WS.
	62	MOTION TO INTERVENE . . . Simon Ferro
	64	ANSWER . . . of defts Chiles, Butterworth and Smith
	65	ANSWER . . . of House Defendants Wetherell and Wallace
4/3	68	ANSWER . . . of defts/intervenor, Simon Ferro
	70	MOTION FOR LEAVE . . . Common cause's to appear as Amicus Curiae and take certain actions.
4/7	79	MOTION . . . Humphrey, Kelly, Adams, Etc., for leave to intervene as pltfs. ref WS
	86	ORDER ON MOTION FOR GWEN HUMPHREY . . . (THREE JUDGE PANEL) EOD 4/7 cc: Rumberger, Meros, Levine, Waas, Peters, Thomson, Moffitt, White, Parker, Judge Atkins, Stafford, Hatchett, Vinson. PLDG. 79 & 80 are GRANTED.
	87	COMPLAINT . . . for injunctive and other equitable relief of Gwen Humphrey.

DATE	NR.	PROCEEDINGS
4/10	102	MOTION . . . Cuban American Bar and the coalition of Hispanic American Women for leave to appear as Amicus Curiae.
4/10	105	ORDER . . . (THREE JUDGE PANEL) EOD 4/10 cc: Thomson, Peters, Waas, Levine, Meros, Rumberger, Judge Hatchett, Vinson, Stafford, Atkins. 1. File a proposed congressional redistricting plan and a legislative reapportionment plan for Florida; 2. Review and comment, in writing, upon plans parties or intervenors file. 3. Participate in any evidentiary hearing to the extent Special Master's Report permits; 4. File objections to the Special Master's Report and 5. Participate in the May 27, 1992 hearing through the [filing] of brief. PLDG #103 is GRANTED
	109	THIRD PARTY COMPLAINT . . . 3rd party pltf's. ref. WS
	112	MOTION . . . Darryl Reaves, Corrine Brown and James T. Hargett to intervene as pltf's. ref. WS
4/13	116	ORDER . . . (THREE JUDGE PANEL) EOD 4/13 cc: Thomson, Peters, Waas, Levine, Meros, Rumberger, Burr, Lamb, Hayes, Judge Vinson, Stafford, Hatchett, Atkins Deft Motion (doc 108) DENIED. (doc 112) GRANTED. The pltf-intervenors shall abide by the March 27th scheduling order and all other orders issued by the court.

DATE	NR.	PROCEEDINGS
4/14	117	ANSWER . . . of defts Chiles, Smith and Butterworth
	119	ANSWER . . . T.K. Wetherell to complaint of intervenors Humphrey, et al. ref. WS
	120	ANSWER . . . House defts Wetherell and Wallace to Complaint of Florida State Conference of NAACP Branches, et al., copy faxed to Judges Hatchett & Vinson, delivered to Judge Stafford & overnight mailed to Judge Atkins
4/15	125	MOTION . . . House defts, to dismiss; alternatively, mo. for abstention or deferral w/memo copy delivered to: Judges Hatchett, Vinson, Stafford, Atkins & copy of mo. faxed to Judge Vinson
4/17	133	MOTION . . . of DANIEL WEBSTER, to appear as Amicus Curiae.
4/17	136	ORDER . . . (3 JP) EOD 4/17/92 Denying House defts' mo. to dismiss and implements an alternative timetable. (See Order) copy faxed to all counsel, Judges Hatchett, Vinson & Atkins.
	137	NOTICE . . . of deft Butterworth, of Section 5 Submission to the Dept. of Justice
	138	MOTION . . . of defts Chiles, Butterworth and Smiths' Motion for Partial Summary Judgment
	140	MOTION . . . of defts Margolis and Gordon, for abstention and/or Partial S/J as to Legislative redistricting. Ref. to all Judges.
	141	NOTICE . . . of filing by House defts of SJR 2G and CB/HB 1-E as their Senate, House and Congressional districting plans. (attachments in 3-separate notebooks)
	144	MOTION . . . of defts Margolis and Gordon to adopt and join House defts Motion to Dismiss,

DATE	NR.	PROCEEDINGS
		alternatively, Motion for Abstention or deferral and memo. Ref. all Judges
	146	ANSWER . . . of deft Florida AFL-CIO.
	147	MOTION . . . of AFL-CIO to intervene.
	152	ANSWER . . . of Intervenor Reddick to Complaint of Florida State Conference of NAACP Branches, et al.
	153	ANSWER . . . of intervenor Reddick to Complaint of Intervenors, Humphrey, et al.
	154	MOTION . . . to intervene by ALZO REDDICK, a Representative in the Florida Legislature.
	160	MOTION . . . of pltfs DeGrandy for Summary Judgment on Cts. 1, ii, III, IV, V, and VI of pltfs Second Amended Complaint
	168	MOTION . . . of Andy Ireland for Leave of Intervene and file plan.
4/20	170	MOTION . . . Congressman Craig T. James to appear as Amicus Curiae and take certain actions.
4/21	180	ORDER . . . (3 JP) EOD 4/21 cc: to all counsel Pldg #133 GRANTED of Daniel Webster. Pldg #134 GRANTED of Jim Bacchus.
4/21	184	MOTION . . . of George C. McGough, Patrick J. Aland, Claude E. McGeachy, Wilson Reed, James S. Miles, Warren Andrews, Walter Sanford, Winston Rushing, Keith Bailey, Ruby Padget, Joe Mangus, Mary Heaston, Barbara Sofarelli, Carmel Ceraola, William Branks, Edwin I. Ford, Jean S. Halvorsen, Duane Runyan, James S. Pitts, and Gerald R. McClelland for leave to intervene as Amicus Curiae ref

DATE	NR.	PROCEEDINGS
4/21	187	RESPONSE . . . pltf's to defts Margolis and Gordon's Motion for abstention and/or partial summary judgment ref.
4/22	189	RESPONSE . . . House defts to motion of Alzo Reddick to Intervene.
4/22	193	ORDER . . . (3 JP) EOD 4/22 cc: all counsel on pending motion; order clarifying scheduling order of 3/27/92.
		Pldg #56 all responses to SJ Motions must be filed by 3:00 p.m. on 4/24/92.
		MOTION TO INTERVENE pldgs #147; 154; 168; 170; 179; and 184 are GRANTED.
		Defts Margolis' & Gordon's motion to adopt and join House defts' motion to dismiss (doc 144) is GRANTED.
		The clk shall copy the deft Margolis & Gordon with the order (doc 136) denying the House defts motion to dismiss
		cc: of pldg #136 mailed to Atty Zack at his Talla. address
	194	RESPONSE . . . pltf's to defts Chiles, Butterworth and Smith's motion for partial summary judgment. ref.
	201	ANSWER . . . defts' Margolis and Gordon, Answer to pltf's complaint
4/24	228	RESPONSE IN OPPOSITION . . . defts Chiles, Butterworth and Smith to pltf's motion for summary judgment on counts V and VI of pltf's second amended complaint.
4/24	246	ORDER . . . (3 JP) EOD 4/24 cc: *FAXED* to all counsel
		House defts' Emergency motion to Modify Scheduling order on Redistricting Hearings is DENIED.

DATE	NR.	PROCEEDINGS
	248	RESPONSE . . . defts' Response to pltf's motion for summary judgment.
5/11	363	MOTION . . . Barr, USA to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which can be granted.
5/12	387	ORDER . . . (3 JP) EOD 5/13 cc: *FAXED* to counsel & mailed
		Further proceedings as to state legislative reapportionment are stayed until 5/27/92.
5/15	390	APPLICATION . . . Humphrey for preliminary injunction against implementation of SJR 2G pursuant to Section 5 of voting rights act.
5/18	394	VOLUME I . . . *TRANSCRIPT* of first day of Reapportionment hearing held May 4, 1992
5/18	395	VOLUME II . . . *TRANSCRIPT* of morning and afternoon session of second day of reapportionment hearings May 5, 1992
	396	VOLUME III . . . *TRANSCRIPT* of evening session of second day of trial held May 5, 1992
	397	VOLUME IV . . . *TRANSCRIPT* of morning and afternoon session of third day of reapportionment hearing held May 6, 1992.
	398	VOLUME V . . . *TRANSCRIPT* of evening session of third day of reapportionment hearings May 18, 1992
	399	VOLUME VI . . . *TRANSCRIPT* of morning and afternoon session of fourth day of reapportionment hearings held May 7, 1992
	400	VOLUME VII . . . *TRANSCRIPT* of evening session of third day of reapoprtionment hearings held May 7, 1992
	401	VOLUME IX . . . *TRANSCRIPT* of afternoon session of fifth day of reapportionment hearings held May 8, 1992

DATE	NR.	PROCEEDINGS
	402	VOLUME VIII . . . *TRANSCRIPT* of morning session of fifth day of reapportionment hearings held May 8, 1992
5/18	403	VOLUME X . . . *TRANSCRIPT* of evening session of fifth day of reapportionment hearing held May 8, 1992
	409	VOLUME XI . . . *TRANSCRIPT* of sixth day of reapportionment hearings held May 15, 1992
5/27	435	RESPONSE . . . pltf's DeGrandy to motion to dismiss
5/27	436	ORDER . . . (3 JP) EOD 5/27 cc: all counsel of records Pldg #363 GRANTED; PLDG #390 DENIED; Pldg #391 DENIED; Pldg #416 DENIED; This court will retain jurisdiction, and will monitor further activities regarding legislative redistricting and Dept. of Justice review. Pldg #426 is DENIED no further action is necessary on doc 414.
5/29	438	OPINION . . . (Hatchett, Stafford, Vinson) Ordered the State of Florida to conduct the 1992 congressional elections and congressional elections thereafter in districts as shown by plan 308, which this court deems the "1992 Florida Redistricting Plan" With Specially Concurring Opinion of J. Vinson. (w/attachments)
5/29	439	JUDGMENT . . . (Hatchett, Stafford, Vinson) ORDERED: 1. The State of Florida's current congressional districts, drawn in 1982, violate the pltfs rights and the rights of all Florida citizens because the districts fail to meet the requirements of Article I section 2 of the U.S. Constitution, the

DATE	NR.	PROCEEDINGS
		Equal Protection clauses of the Fourteenth Amendment to the U.S. Constitution, the one-person-one-vote Principle and the Voting Rights Act of 1965, as amended. 2. The court adopts plan 308, the 1992 Florida Redistricting Plan, as the plan to be utilized in the 1992 Florida congressional elections and in Florida congressional elections thereafter. 3. The defendants, individually, and their successors, agents, employees, attorneys, and persons acting in concert or in participation with them shall: (a) conduct congressional election in 1992 in accordance with the redistricting plan this court has adopted called "The 1992 Florida Redistricting Plan," a map and written description of which are attached to the Judgment. (b) Conduct congressional elections in years after 1992 in accordance with the 1992 Florida Redistricting Plan.
6/18	448	MOTION . . . pltfs for leave to file third amended complaint and memorandum of law in support thereof.
	450	MOTION . . . to intervene and for declaratory and injunctive relief by Florida State Assoc. of Supv. of Elections, Inc. ref WS
6/23	468	DECLARATION . . . of Allan J. Litchman
	471	AFFIDAVIT . . . of Dario V. Moreno
	472	AFFIDAVIT . . . of Thomas B. Hoeffler
6/25	495	NOTICE OF FILING . . . deft's Florida Supreme Court order and Motion to Stay.
	499	MOTION . . . deft's to dismiss/motion for summary judgment as to pltfs' third amended com-

DATE	NR.	PROCEEDINGS
		plaint for declaratory judgment and injunctive relief with memo.
6/25	502	NOTICE OF ADOPTION . . . Senate Defendants of House defts motion to dismiss, motion for summary judgment as to pltf's third amended complaint for declaratory judgment and injunctive relief.
6/26	506	MOTION . . . pltf's for leave to file fourth amended complaint and memorandum of law in support thereof.
6/27	509	MOTION . . . pltfs for leave to file voluntary dismissal, without prejudice, with respect only to certain section 2 challenges to certain districts in the Florida House of Representatives Redistricting Plan.
6/29	513	ANSWER . . . Senate deft's to fourth amended complaint for declaratory judgment and injunctive relief.
	514	MOTION . . . Senate deft's to refer the modification of SJR-2G, as modified by the Florida Supreme Court, to the Florida Supreme Court, should the court conclude it violates section 2 of the Voting Rights Act.
	516	ANSWER . . . deft Chiles, Butterworth & Smith to third amended complaint.
	521	ANSWER . . . of defts Margolis and Gordon.
	524	AFFIDAVIT . . . of William DeGrove.
	525	ANSWER . . . House defts Wetherell and Wallace to pltf's third amended complaint.
	526	ANSWER . . . defts Wetherell and Wallace to complaint of USA.
7/1	541	AFFIDAVIT . . . of William M. DeGrove.
	543	ANSWER . . . defts State of Florida, et al.

DATE	NR.	PROCEEDINGS
	546	AFFIDAVIT . . . of Steven A. Geller.
	547	AFFIDAVIT . . . of Robert M. Levy.
7/1	548	CONSENT JUDGMENT . . . EOD 7/1 cc: to all counsel of records COR 1992 PAGE
7/1	549	MINUTES . . . of 3-Judge Panel Proceedings on legislative Redistricting. —Court announced ruling Against all plaintiffs in the Dade County (Senate) portion of proceedings. —Court adopts the 'Modified DeGrandy Plan' of the (House) portion of proceedings re: Dade County. Written order and opinion to follow. Judgment to be entered. C/R Paul Rayborn, Lisa Jones, Judy Ellan, Cathy Webster, and Beth White
7/2	550	EMERGENCY MOTION . . . Executive defts for reconsideration.
7/2	551	RESPONSE IN OPPOSITION . . . DeGrandy to Emergency motion for reconsideration.
	553	JUDGMENT . . . (3-Judge Panel) cc: to all counsel (Senate Joint Resolution 2-G as modified by the Florida Supreme Court on 6/25/92.) (see judgment)
	554	JUDGMENT . . . (3-Judge Panel) cc: to all counsel (Florida's House of Representatives joint resolution 2-G as validated by the Florida Supreme Court on 5/13/92.) (see judgment)
	555	ORDER . . . (3-Judge Panel) cc: to all counsel The Executive defts Emergency Motion for Reconsideration #550 is DENIED.
	556	EMERGENCY MOTION . . . House deft's for reconsideration, rehearing, relief from order with memorandum of law

DATE	NR.	PROCEEDINGS
	557	AFFIDAVIT . . . of Kimball W. Brace
	558	AFFIDAVIT . . . of George H. Meier
7/6	559	SUPPLEMENT TO THE JUDGMENT . . . (3-Judge Panel) EOD 7/6 cc: to all counsel CIV. ORDER BK 1992 PP 150-357 Filed herein is a map and written description of the 1992 Florida House Plan adopted by this court on 7/1/92 and referred to in the judgment dated 7/2/92 (doc. 554).
	560	ORDER . . . (3-Judge Panel) EOD 7/6 cc: all counsel. Pldg #556 is DENIED.
7/6	561	AMENDED EMERGENCY MOTION . . . House defts for reconsideration, rehearing, relief from order, and for stay with memorandum of law.
7/7	562	ORDER . . . Supreme Court of the United States denying application for stay.
	563	TRANSCRIPT . . . VOLUME I of proceeding held before 3-Judge Panel on 6/26/92.
	564	TRANSCRIPT . . . VOLUME II of proceeding held before 3-Judge Panel on 6/26/92.
	565	TRANSCRIPT . . . VOLUME III of proceeding held before 3-Judge Panel on 6/27/92.
	566	TRANSCRIPT . . . VOLUME IV of proceeding held before 3-Judge Panel on 6/29/92.
	567	TRANSCRIPT . . . VOLUME V of proceedings held before 3-Judge Panel on 6/30/92.
	568	TRANSCRIPT . . . Volume VI of proceeding held before 3-Judge Panel on 6/30/92.
	569	TRANSCRIPT . . . VOLUME VII of proceeding held before 3-Judge Panel on 7/1/92.
	570	TRANSCRIPT . . . VOLUME VIII of proceedings held before 3-Judge Panel on 7/1/92.

DATE	NR.	PROCEEDINGS
7/9	571	ORDER . . . (3-Judge Panel) EOD 7/9 cc: to all counsel. The House defts' amended emergency motion for reconsideration, rehearing, relief from order and for stay (doc 561) is DENIED.
7/16	577	ORDER . . . (3-Judge Panel) EOD 7/17 cc: to all counsel 1. The Emergency Motion for adoption of an interim plan of Apportionment and the request for Oral Argument thereon are hereby DENIED. 2. Qualification for the Florida Senate and House of Representatives shall continue under the plan adopted in this court's judgment entered on 7/2/92.
7/17	578	ORDER . . . (3-Judge Panel) EOD 7/17 cc: all counsel With respect to Florida's House of Representatives Districts we adopted the modified DeGrandy House of Representative Plan, Plan 268, as the court's plan and also impose that plan. .
7/24	594	APPEAL . . . NOTICE OF to U.S. Supreme Court of 5/29/92 judgment by defts. Wetherell and Wallace.
7/24	595	APPEAL . . . NOTICE OF to U.S. Supreme Court of 7/2/92 judgment by defts. Wetherell and Wallace.
7/31	601	NOTICE OF APPEAL . . . USA
8/31	610	MOTION . . . DEGRANDY for attys' fees and costs and memorandum in support thereof
	611	MOTION . . . Humphrey for an award of attys' fees and litigation expenses

DATE	NR.	PROCEEDINGS
9/4	619	MOTION . . . Reaves, Brown, Hargrett for an award of atty's fees and litigation expenses
9/23	625	SUPPLEMENTAL MOTION . . . REAVES, BROWN, HARGRETT for an award of atty's fees and litigation expenses on behalf of Hunter & Vanture, P.A.
9/29	627	MOTION . . . NAACP for atty's fees and litigation expenses & costs with memorandum of law in support
10/7	630	NOTICE . . . deft Waiver of Appeal of this Court's Judgment with respect to congressional districts

[Excerpts from Stipulated Facts Submitted to the Special Master in the Congressional Districting Proceeding, April 3, 1992]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No.: 92-40015WS

MIGUEL DE GRANDY, *et al.*,
Plaintiffs,

vs.

T.K. WETHERELL, in his official capacity, *et al.*,
Defendants.

STIPULATED FACTS

Without waiving the right of the parties to object to the relevancy, materiality, probative value, or admissibility of these facts, plaintiffs, Miguel De Grandy, et al., and Defendants, T. K. Wetherell, et al., submit this stipulation of facts pursuant to this Court's order of March 27, 1992:

* * * *

(All defendants except Gordon and Margolis stipulate to paragraphs 23 and 51-92, contingent upon Plaintiffs supplying primary governmental source references supporting these paragraphs within seven working days).

23. In addition, over the last 15 years, the number of voters registering Republican has increased from 27.84% to 41.07% of registered voters, while the number of Democrats has decreased from 67.24% to 51.6%.

* * * *

31. According to the 1990 federal decennial census, the population of the State of Florida is 12,937,926, an increase of 3,213,602 persons since the 1980 decennial census. This increase in population entitles Florida to an additional four members in the United States House of Representatives, increasing the size of the State's congressional delegation from 19 to 23 members, pursuant to 2 U.S.C. § 2.

* * * *

50. In its analysis of the 1980 riots in Liberty City, the U.S. Commission on Civil Rights wrote in 1982 that

> Many Black Miamians are contributing to the progress of their communities and the city as a whole. Black support for a rapid transit system in a 1978 referendum made the project possible. The Black Miami-Dade Chamber of Commerce, albeit, with limited success, has coordinated efforts with the Greater Miami Chamber of Commerce in two projects designed to increase the number of black businesses in Dade County. But the Black community in Miami has neither the size nor wealth that commands political power and accountability in Miami. Acting alone, it cannot control or improve the circumstances in which they live.

Confronting Racial Isolation in Miami, U.S. Commission on Civil Rights, (Washington, 1982), p. 314 (Hereinafter referred to as "Racial Isolation").

51. The U.S. Commission on Civil Rights concluded its report by saying that

> Unless a racially conscious effort is made to overcome the social and economic disadvantages imposed on Black Miamians and to offer them the opportunity to develop a prosperous community again, the present sense of alienation and frustration will continue to pervade Black life in Dade County.

Racial Isolation, p. vii.

52. Dade County's school system was found to be segregated in the 1970's and continues to operate under federal court supervision. Overall, African-Americans and Hispanic students continue to score significantly lower than non-Latin white students. In addition, African-Americans and Hispanics have lower levels of graduation from high school than do non-Latin whites.

53. Overall, Hispanics and African-Americans have lower levels of income than do non-Hispanic whites according to a study published by Metropolitan Dade County. These substantial economic disparities continue to disadvantage African-Americans and Hispanic political participation.

54. Blacks in Dade County constitute a sufficiently large and geographically compact minority group to constitute a majority in a single-member congressional district.

55. Hispanics in Dade County constitute a sufficiently large and geographically compact minority group to constitute a majority in two single-member congressional districts.

56. The following table accurately summarizes the racial and ethnic demographics of the population of Dade County, Florida from 1960 through 1990.

57. The following table accurately summarizes the racial and ethnic demographics of the voting age population of Dade County, Florida from 1960 through 1990.

Year	Total VAP	Hispanic VAP	Hispanic VAP%	Non Hispanic Black VAP	Non Hispanic Black VAP%	Non Hispanic White VAP	Non Hispanic White VAP%
1960	642,598	25,786	4.01%	79,706	12.40%	537,106	83.58%
1970	897,136	202,748	22.60%	105,914	11.81%	588,474	65.59%
1980	1,233,545	439,429	35.62%	169,582	13.75%	624,534	50.63%
1990	1,469,084	741,846	50.50%	239,955	16.33%	487,283	33.17%

58. The table which is attached hereto as Exhibit 2 accurately reflects non-Hispanic Black voter registration in Dade County from 1960 to 1991 based on records kept by the Dade County Division of Elections.

59. Between the 1980 and 1990 Census, Dade County's Hispanic population grew by 64% and the non-Hispanic Black population grew by 37%, while the non-Hispanic White population decreased by 21%.

60. During the period between 1980 and 1990, Cuban Americans comprised a smaller percentage of Dade's Hispanic population. During this period the number of Cuban Americans increased by 157,000 people or 38.5%. During the same period other Hispanics (*i.e.*, not Cuban, not Puerto Rican, not Mexican), primarily Nicaraguan and Colombian, increased by 178,000 people or 150%.

61. Dade County was created by an act of the Florida Legislative Council in 1836.

62. In 1957, the voters of Dade County adopted a Home Rule Charter, providing for the election of five members of the County Commission from single-member districts, five by the voters at-large, and one representative from each municipality with more than a 60,000 population. In 1957, the City of Miami was the only municipality that qualified to have its own commissioner. After the 1960 Census, Miami, Miami Beach and Hialeah qualified to have municipally elected representatives on the County Commission.

63. By 1963, the County Commission was comprised of 13 members: five elected from districts, five at-large, and one from each of the cities of Miami, Hialeah, and Miami Beach.

64. In 1964, the Home Rule Charter was amended, replacing the mixed system of electing County Commissioners with the present at-large system. Under the present system, eight commissioners, elected by the voters at-large, would run from residence districts. In addition, the position of County Mayor was created. The Mayor does not enjoy any Charter designated authority to separate him from any of the other commissioners, except that he is required to preside at commission meetings and must deliver an annual State of the County Address.

65. A total of five Blacks have served on the County Commission. The first Black to serve on the County Commission, Earl J. Carroll, was elected in 1968. Carroll was suspended by the Governor and John A. Cavalier and Neal Adams were named to serve during Carroll's suspension. Cavalier is white and Adams is Black.[1] Carroll and three white commissioners were recalled by the voters on March 14, 1972. Edward T. Graham, a Black, was appointed by the County Commission in April 1972 to replace Carroll and subsequently won election for the seat in the fall 1972 election. Graham was suspended by the Governor in May 1975 and Neal Adams was appointed to finish Graham's term. Adams was elected to a two year term in October 1976 and reelected in October 1978, but was suspended by the Governor in November 1979. Barbara Carey, who is Black, was appointed by the Governor in December 1979 to replace Adams and served until October 1990, when she was defeated by Arthur Teele, who is Black, in a September 1990 primary.

66. The Black candidates elected to the County Commission from 1968-1986 received the majority of the Black votes cast, and won majority support in all of the heavily Black precincts (precincts in which Blacks comprised at least 85% of the registered voters), except in the 1978 election of Neal Adams who won 33 of the 36 Black precincts in existence at the time of the election.

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[1] Adams served during Carroll's first suspension, from May through July 1969, and Cavalier served during Carroll's second suspension from June to July 1970. Several white commissioners were also suspended at this time.

67. In September 1990, Sherman Winn, a white candidate, was elected from residence District 4 with the support of the majority of Black voters, in a race against two Black candidates and a white candidate. Sherman Winn won majority support in 49 of 52 heavily Black precincts in existence at the time of the election.

68. Since 1968, there have been a total of thirteen (13) races for the County Commission involved one or more Black candidates. The candidates who received the majority of Black votes were elected in seven (7) races: Earl Carroll in 1968, Edward T. Graham in 1972, Neal Adams in October 1976 and October 1978, Barbara Carey in 1982 and 1986, and Sherman Winn in 1990. All of the Black candidates who were elected received in excess of 60% of the Black votes cast. The vote for the Black candidates who were not elected are as follows:

a. In 1990, Barbara Casey received 46.9% of the total vote and lost a race for District 3, and received in excess of 60% of the Black votes cast and won the majority vote in all heavily black precincts at the time of election.

b. In 1990, Betty Ferguson lost a runoff race for District 1, receiving 48.39% of the total vote, and received in excess of 60% of the Black votes cast and won the majority vote in all heavily black precincts at the time of election.

c. In 1986, Betty Ferguson lost a runoff race for District 1, receiving 46.6% of the total vote, and received in excess of 60% of the Black votes cast and won the majority vote in all heavily black precincts at the time of election.

d. In 1982, Akbar Muhammad lost a primary race for District 1, receiving 15.7% of the total vote, and received in excess of 60% of the Black votes cast won the majority vote in all heavily black precincts at the time of election.

e. In 1976, Clinton Brown lost a runoff race for District 1, receiving 37.1% of the total vote, and received in excess of 60% of the Black votes cast and won the majority vote in all heavily black precincts at the time of election.

f. In 1974, Tom Washington lost a primary race for County Mayor, receiving 7.1% of the total vote, and received the majority of the Black votes cast.

69. Edward T. Graham, Neal Adams, and Barbara Carey were first appointed to the County Commission prior to their subsequent elections.

70. The information which is contained in Exhibit 3 attached hereto accurately portrays the County Commission and the Dade County School Board elections involving Black candidates.

71. In September 1981, the Board of County Commissioners appointed Jorge Valdes, a Hispanic, to the County Commission to replace Bill Oliver, who resigned to run for state office.

72. At the time of his election in 1982 and 1986, Jorge Valdes received the majority of Hispanic votes. In 1990, Jorge Valdes was defeated by Alex Penelas, a Hispanic.

73. Only two Hispancis, Valdes and Penelas, have served on the County Commission.

74. The informaiton which is contained in Exhibit 3 attached hereto accurately portrays the County Commission elections and School Board elections involving Hispanic candidates.

75. Since 1970, the Dade County School Board has had three Hispanic members, Alfredo Duran, Paul Cejas, and Rosa Castro-Feinberg, and two Black members, Joyce Knox and William Turner. Alfredo Duran was

appointed to the School Board in October 1973 to replace Crutcher Harrison upon her resignation and served until November 1974. Duran was defeated by Linton Tyler in the September 1974 Democratic primary. Paul Cejas was appointed in March 1980 and elected to a full term in 1984. Rosa Castro-Feinberg was appointed in September 1986 to replace Kathleen Magrath upon her resignation and was elected in 1988 to a four year term. William Turner was first elected to the School Board in 1970 and reelected in 1974. Turner lost a Democratic runoff to Joyce H. Knox in 1978, and Knox was elected that same year. Turner was subsequently reelected in 1982, 1986 and 1990.[2]

76, Blacks in Dade County experience depressed education, employment, health, and housing levels relative to the rest of the population in Dade County.

77. The charts attached hereto as Composite Exhibit 6 accurately reflect the racial and ethnic makeup of Dade County employees as of September 30, 1991.

78. According to the survey attached hereto as Exhibit 1, as of May 1991, voting age Hispanics in Dade County had attained a citizenship level of 61.1%. Under Florida law these Hispanic citizens are qualified to become voters. Removing the 38.9% of the voting age Hispanics in Dade County who are not citizens from the pool of eligible voters reduces the share of citizen voting age Hispanics to an electoral minority.

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[2] The School Board of Dade County, Florida is the governing body of the Dade County Public Schools. The Board is composed of seven members, all elected by the electors of the County at-large with five members running from residency districts and two who may reside anywhere in the County. The Board is presently comprised of Chairperson Janet McAliley, Co-Chairperson Betsy Kaplan and members Robert Renick, William Turner, Dr. Michael Krop, Holmes Braddock, and Rosa Castro-Feinberg. Castro-Feinberg is Hispanic and Turner is Black. Election to the School Board is partisan with four year terms and staggered election years.

79. As of the book closing for the November 6, 1990 election, the records of the Dade County Division of Elections contained the following breakdown of registered voters by race and ethnicity:

Non-Latin Whites	342,853	50.88%
Non-Latin Black	130,519	19.37%
White Hispanic	187,393	27.81%
Black Hispanic	3,262	0.48%
Other	9,811	1.46%
Total	673,838	100.00%

80. Each of the three major population segments of Dade County is heterogeneous, composed of distinct groupings. The Hispanic population is comprised of significant populations of Cubans, Nicaraguans, Puerto Ricans, and Colombians.

81. A significant segment of the Non-Hispanic Black population is Haitian.

82. The non-Hispanic White population spans from the rural farm population of southwest Dade to the condominium dwellers of Northeast Dade.

83. Since 1976, there have been a total of 5 primary races for the County Commission involving one or more Black candidates who received the majority support of Black voters, but who were forced into a runoff. The vote for these Black candidates who were forced into a runoff are as follows:

a. In 1976, Clinton Brown was forced into a runoff race for District 1, receiving 23.0% of the total vote in the primary and received in excess of 60% of the Black votes cast and won the majority of the votes cast in all heavily Black precincts at the time of election. Clinton Brown lost in the runoff.

b. In 1976, Neal Adams was forced into a runoff race for District 3, receiving 42.3% of the total

vote in the primary and won the majority vote in all heavily black precincts at the time of election. Adams won the runoff.

c. In 1978, Neal Adams was forced into a runoff race for District 3, receiving 42.7% of the total vote in the primary, and won the majority vote in all heavily black precincts at the time of election. Adams won the runoff.

d. In 1986, Betty Ferguson was forced into a runoff race for District 1, receiving 39.7% of the total vote in the primary, and received in excess of 60% of the Black votes cast and won the majority vote in all heavily black precincts at the time of election. Ferguson lost the runoff.

e. In 1990, Betty Ferguson was forced into a runoff race for District 1, receiving 38.4% of the total vote in the primary, and received in excess of 60% of the Black votes cast and won the majority vote in all heavily black precincts at the time of election. Ferguson lost the runoff.

84. No Black candidates has been elected to the County Commission from any residence district other than from residence district 3.

85. No Hispanic candidate has been elected to the County Commission from any residence district other than from residence district 2.

86. Dade County has experienced riots in 1980, 1982, 1984, and 1989. In each instance, the riots involved events associated with the killing of Black men by non-Hispanic White and Hispanic police officers.

87. The following is a list of county wide elected positions in Dade County:

Office	Number of Positions
Dade County Commission	
County Mayor	1
County Commissioners	8
Dade County School Board	7
Dade State Attorney	1
Dade County Fire Board	5
Dade Public Defender	1
Clerk of the Circuit Court	1
Circuit Court Judges	68
County Court Judges	33
TOTAL	125

88. To date, no Black or Hispanic has been elected to the offices of State Attorney or Public Defender.

89. The Office of Clerk of the Circuit Court was held from 1972 until 1990 by Richard P. Brinker, a non-Latin White. Prior to 1972, the office of the Clerk of the Circuit Court had been held by a non-Latin White. In 1990, upon the resignation of Brinker, Governor Bob Martinez appointed Tony Coterello, a Hispanic, as Clerk of the Circuit Court. Coterello was defeated in November 1990 by Marshall Ader, a non-Latin White.

90. Judges elected and appointed in Dade County on both the circuit and county level have also been traditionally non-Latin White. Of the 68 circuit court judges presently sitting, four are Hispanic and two are Black. In addition, there are 33 county judges. Of those, only two are Black and two are Hispanic. Each of these 10 minority jurists were initially appointed to the bench by either the Dade County or Eleventh Circuit Judicial Nominating Commissions.

91. The Dade County Fire Board was created by a 1986 amendment to the Dade County Charter. Members of the Fire Board are elected at-large, with the top

five vote recipients winning a seat on the Board. Its five members have included one Hispanic from the first election of members in 1986. There have been three Hispanic candidates and no Black candidates. No Black has served on the Fire Board.

92. In addition, a survey of the municipalities in Dade County as of March 1991 revealed the following ethnic and racial breakdown of city commissioners.

Municipality	Total	NLW	Hispanic	Black
Bay Harbour	5	5	0	0
Bay Harbor Islands	7	7	0	0
Biscayne Park	5	5	0	0
Coral Gables	5	5	0	0
El Portal	7	6	0	1
Florida City	5	1	0	4
Golden Beach	5	5	0	0
Hialeah	7	1	6	0
Hialeah Gardens	5	3	2	0
Homestead	7	4	2	1
Indian Creek	5	5	0	0
Medley	5	5	0	0
Miami	5	1	3	1
Miami Beach	7	7	0	0
Miami Shores	5	5	0	0
Miami Springs	5	5	0	0
North Bay Village	5	5	0	0
North Miami	5	5	0	0
North Miami Beach	7	7	0	0
Opa Locka	5	0	0	5
South Miami	5	4	0	1
Surfside	5	3	2	0
Sweetwater	7	1	6	0
Virginia Gardens	5	2	3	0
West Miami	5	1	4	0
TOTAL	139	98	28	13

93. There are presently 21 members of the Dade delegation to the Florida House of Representatives. From at least 1885 to the mid 1960s the Florida House was apportioned by county rather than by population. During this period, no Blacks or Hispanics served in the Florida House from Dade County. From the mid 1960s to 1982, members of the Florida House were elected from multi-member districts, with as many as six representatives elected from a large geographic multi-member district. During that period no Hispanics were elected and two Blacks were elected from Dade County. In 1982, in a special election to fill an empty seat, Roberto Casas was elected as the first Cuban representative from Miami. In 1982, the Florida House adopted a single-member district system of electing representatives. The racial and ethnic breakdown of the present 21-member Dade House delegation are as follows:

District	Name	Race or Ethnicity
100	Ronald A. Silver	Non Latin White
101	Michael Abrams	Non Latin White
102	Elaine Gordon	Non Latin White
103	Michael Friedman	Non Latin White
104	Elaine Bloom	Non Latin White
105	Alberto Gutman	Hispanic
106	Darryl Reaves	Black
107	James Burke	Black
108	Willie Logan, Jr.	Black
109	Luis Rojas	Hispanic
110	Miguel De Grandy	Hispanic
111	Rodolfo Garcia	Hispanic
112	Carlos L. Valdes	Hispanic
113	Luis C. Morse	Hispanic
114	Bruce Hoffman	Non Latin White
115	Marlo Diaz-Balart	Hispanic
116	Art Simon	Non Latin White
117	Susan Guber	Non Latin White
118	Darryl Jones	Black
119	John Cosgrove	Non Latin White
120	Ron Saunders	Non Latin White

94. There are presently seven members of the Dade delegation to the Florida Senate. From at least 1885 to the mid 1960s, the Senate, like the Florida House, was apportioned by county rather than by population. During this period, no Blacks or Hispanics served in the Senate from Dade County. From the mid 1960s to 1982, members of the Florida House were elected from multi member districts, with as many as three senators elected from a large geographic district. During that period no Hispanics or Blacks had been elected from Dade County. In 1982, the Florida Senate adopted a single member district system of electing senators. The racial and ethnic breakdown of the present 7 member Dade Senate delegation are as follows:

District	Name	Race or Ethnicity
33	Roberto Casas	Hispanic
34	Lincoln Diaz-Balart	Hispanic
35	Jack D. Gordon	Non Latin White
36	Carrie Meek	Black
37	Gwen Margolis	Non Latin White
39	Lawrence Plummer	Non Latin White
40	Javier Souto	Hispanic

95. The Dade County Supervisor of Elections defines Hispanics based on place of birth outside the United States in Hispanic nations. The United States Census defines Hispanics based on self-identification.

96. During the Special Apportionment Session on Thursday, April 2, 1992, Senator Ander Crenshaw moved the Senate recess until 1:30 p.m., Monday April 6, 1992. Defendants Gordon and Margolis voted against this motion, but it passed the Senate by a vote of 20-19. A copy of the official vote tally from the Secretary of the Senate is set forth below:

Yeas 20		Nays 19	NV 1
Y Bankhead	Y Diaz Balart	Y Johnson	Y Plummer
Y Beard	Y Dudley	N Kirkpatrick	Y Scott
Y Brown	N Forman	Y Kiser	Y Souto
Y Burt	N Gardner	N Kurth	N Thomas
Y Casas	N Girardeau	Y Langley	N Thurman
N Childers	N Gordon	N Malchon	N Walker
Y Crenshaw	Y Grant	CHR Margolis	N Weinstein
Y Crotty	Y Grizzle	Y McKay	N Weinstock
N Dantzler	N Jenne	Meek	N Wexler
N Davis	Y Jennings	Y Myers	N Yancey
			N Mr. President

In the Chair — Margolis

The parties agree to attempt to stipulate to additional facts.

DISPUTED FACTS

All facts not stipulated herein are disputed.

DATED this 3rd day of April, 1992.

Respectfully submitted.

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HOUSE DEFENDANT'S EXHIBIT 7

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No. 92-40015-WS

MIGUEL DE GRANDY, *et al.*,
Plaintiffs,

and

GWEN HUMPHREY, *et al.*,
Intervenors,

-vs-

T. K. WETHERELL, in his official capacity, *et al.*,
Defendants,

T. K. WETHERELL, in his official capacity, *et al.*,
Third Party Plaintiffs,

-vs-

WILLIAM P. BARR, as Attorney General of the United States of America,
Third Party Defendant.

Case No. 92-40131-WS

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, *et al.*,
Plaintiffs,

-vs-

LAWTON CHILES, in his official capacity, *et al.*,
Defendants.

NOTICE OF FILING AND SERVICE

The House Defendants here notice the filing of the evaluation by Election Date Services, Inc. of SJR 2-G and CS/HB 1-E.

Respectfully submitted,

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Fla. Bar #0253286

/s/ James A. Peters
JAMES A. PETERS
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ELECTION
DATA
SERVICES
INC.

Election Data Services, Inc. has been retained by the Florida House of Representatives Committee on Reapportionment to evaluate redistricting plans passed by the House: the state house plan in SJR 2-G and the congressional plan in CB/HB 1-E. Specifically, we have been asked to evaluate the two redistricting plans with regard to population deviations and recognition of minority voting strength.

One Person, One Vote

The congressional plan has a total deviation of 9 persons, for an overall percentage deviation of .0000159. The smallest deviation possible for the state is .0000017. The difference is .0000142, which is insignificant statistically.

SJR 2-G creates a state house plan with an overall percentage deviation of 1.99%. Furthermore, the deviations from ideal are attributable to the reported House of Representaitves practice of compensating for the otherwise unadjusted net undercount of minorities in the U.S. Census [1] by overpopulating majority white districts by 0.5 percent while underpopulating minority districts by between 0.75 to 1.5 percent.

Recognition of Minority Voting Strength

In order to determine if the state house and congressional redistricting plans passed by the House of Represenatives recognize minority voting strength in the state of Florida, it is first necessary to locate sufficiently large concentrations of minority populations to create effective

[1] See Final Decision, Vol. 56, *Federal Register*, #140, p. 33582.

minority districts. In Florida, Hispanics are sufficiently concentrated to create districts with significant Hispanic populations only in Dade County; blacks are concentrated in large enough numbers to create districts with significant black populations in Broward, Dade, Duval, Hillsborough, Orange and Pinellas Counties. Once districts with significant minority populations have been identified, an analysis must be conducted to determine the number of effective minority districts created by a plan. Effective minority districts are districts in which it is very likely that a minority-preferred candidate will win.

The following standard techniques were used to determine if a district provides minorities with an equal opportunity to elect candidates of their choice: 1) recompiling past precinct-level election returns into the proposed district boundaries to determine if minority-preferred candidates would have won in the new districts; 2) calculating the percentage minority voting age population needed to equalize white and minority turnout (given the differences in turnout rates between the groups); and 3) analyzing voting patterns by race to determine if minority groups voted cohesively and if we can expect any white crossover voting for minority-preferred candidates.

The analysis of all districts with minority populations over 30% black or Hispanic indicates that the congressional plan (CB/HB 1-E) has two effective black districts (congressional districts 20 and 15), an effective Hispanic district (congressional district 17) and a second Hispanic district that will probably elect a Hispanic-preferred candidate to office (congressional district 18). Table 1 lists all congressional districts with minority populations over 30% and identifies those classified as effective by an asterisk.

Table 1: Congressional Districts Over 30% Minority
CB/HB 1-E

Majority Black Districts

District	% Black Population	(% Non-Hisp. Black Pop.)	% Black VAP	(% Non-Hisp. Black VAP)
*20	60.19	(57.4)	55.3	(52.6)

Districts Between 30% and 50% Black Population

*15	49.96	(48.5)	44.3	(42.9)
3	36.89	(36.6)	33.3	(33.0)

Majority Hispanic Districts

District	% Hispanic Population	% Hispanic VAP
*17	64.75	65.1
18	63.83	64.8

This congressional plan will produce an increase—from 1 to at least 3 (and probably 4)—in the number of districts that elect minority-preferred candidates to office.

The state house plan (SJR 2-G) has a total of 15 effective black districts (all majority black districts plus house districts 23 and 118) and 9 effective Hispanic districts (all majority Hispanic districts) as well as another Hispanic district that will probably elect a Hispanic-preferred candidate to office (house district 58). Table 2 lists all state house districts with minority populations over 30% and identifies those classified as effective by an asterisk.

Table 2: State House Districts Over 30% Minority
SJR 2-G

Majority Black Districts

District	% Black Population	(% Non-Hisp. Black Pop.)	% Black VAP	(% Non-Hisp. Black VAP)
* 8	51.6	(51.3)	46.0	(45.8)
* 14	56.1	(55.7)	54.0	(53.7)
* 15	56.7	(56.4)	51.2	(50.9)
* 39	55.4	(54.3)	50.2	(49.2)
* 55	52.8	(52.1)	46.9	(46.4)
* 59	56.9	(55.7)	52.0	(50.9)
* 84	58.6	(57.4)	53.2	(52.0)
* 93	57.3	(55.6)	50.1	(48.6)
* 94	57.1	(55.8)	50.2	(48.9)
*103	62.0	(59.5)	58.2	(55.7)
*104	58.7	(56.4)	53.1	(51.0)
*108	66.2	(62.8)	60.5	(57.2)
*109	63.0	(59.6)	58.8	(55.2)

Districts Between 30% and 50% Black Population

District	% Black Population	(% Non-Hisp. Black Pop.)	% Black VAP	(% Non-Hisp. Black VAP)
3	30.0	(29.9)	26.0	(25.9)
* 23	34.0	(33.7)	28.4	(28.2)
*118	34.5	(33.3)	31.7	(30.4)

Majority Hispanic Districts

District	% Hispanic Population	% Hispanic VAP
*102	65.6	65.7
*107	65.0	63.9
*110	82.1	83.6
*111	75.7	76.6
*112	67.7	68.7
*113	73.9	75.7
*114	77.5	78.4
*115	65.3	65.3
*117	68.3	69.2

Districts Between 30% and 50% Hispanic Population

District	% Hispanic Population	% Hispanic VAP
58	31.1	31.0
106	32.3	30.1
109	34.5	38.4
116	46.7	46.4

This state house plan would increase the number of districts that elect minorities from 20 to at least 24—and probably 25.

Recompiling election returns:

The first step in the analysis was to recompile past precinct election returns in the proposed districts and to recalculate the candidate totals to determine if the minority-preferred candidates would have won in the proposed districts. The following recent statewide contests were recompiled to determine if a district was an effecive black district: the 1990 general election vote for the retention of Justice Shaw on the state supreme court, the 1990 Democratic primary and runoff for secretary of state which included Alcee Hastings, a black candidate; and the 1988 Democratic presidential preference contest in which Jessee Jackson competed. The statewide election contests examined to determine if a district was an effective Hispanic district were the 1990 and 1986 general election contests for governor, both of which included Robert Martinez, a Hispanic Republican.

The database used for this analysis contained all precincts, even those precincts split between two new districts. Election returns were allocated to the split segments of a precinct in two ways: 1) a disaggregation of the election returns on the basis of the percentage voting age population in each of the split segments; and 2) a disaggregation of the returns that took into account the

racial composition of the split segments of the precinct and the differential voting patterns of the racial groups.

If the recompiled election returns indicated that the minority state house district was clearly a safe minority district, then no further analysis was conducted. In the case of black state house districts, a district was deemed to be a safe black district if it was at least 57% black in total population and the black candidate won with at least 60 percent of the vote in all of the elections examined. A Hispanic house district was considered a safe Hispanic district if it was at least 67% Hispanic in total population and the Hispanic candidate won both of the elections examined. All congressional districts over 30% black or Hispanic, whether they met the above criteria or not, were examined in more detail.

Participation rates and voting patterns by race/ethnicity:

In the second stage of the analysis the voting patterns and participation rates of whites and minorities in Florida were examined using two standard techniques, bivariate ecological regression analysis and homogeneous precinct analysis. Both of these procedures are commonly used in voting rights litigation and were accepted by the Supreme Court in *Thornburg v. Gingles* (1986).

Both of these techniques were used to analyze statewide elections, state legislative elections that occurred within the current districts, and election returns recompiled to the proposed districts in CB/HB 1-E and SJR 2-G. In performing an analysis of voting patterns and participation by race/ethnicity in the proposed districts, only whole precincts were used in the regression analysis unless the plan split more than 30% of the precincts in the districts with significant minority population (districts with 30% or greater black or Hispanic populations). If more than 30% of the precincts were split, then the split parts of the precincts were included in the analysis (with the

corresponding election returns disaggregated to the split segments on the basis of voting age population percentages).

This analysis indicates that blacks in Florida vote cohesively for black candidates. Over 79% of the black voters voted to retain Judge Shaw in the 1990 general election, and over 83% of the black voters voted for Alcee Hastings in the 1990 primary and general elections. This was true statewide as well as within each of the proposed black congressional districts. The degree of white crossover voting for black candidates varied across the state, but was high only in the Shaw retention race (in which a majority of whites voted "yes" to retain Shaw). In the two proposed black districts Judge Shaw also received a majority of the white votes (in congressional district 20 Shaw received approximately 58% of the white vote and in congressional district 15 Shaw received over 60% of the white vote).

Turnout rates for blacks tended to be lower than turnout rates for whites in general elections (and higher than whites in Democratic primaries), but this also varied across the state. For example, in the 1990 general election, approximately 38% of the white voting age population turned out and approximately 20% of the black voting age population turned out. However, in some districts blacks turned out to vote at a higher rate than whites in general elections—for instance, in proposed congressional district 20 only 30% of the whites of voting age turned out, while approximately 35% of the black voting age population turned out to vote.

Hispanic voters also voted cohesively, although not to the same degree as black voters. For example, in the 1990 general election, about 59% of the Hispanics voting in the gubernatorial contest voted for Martinez. This percentage appears to be somewhat higher in the two majority Hispanic congressional districts: in congressional district 17 Martinez garnered about 64% of the Hispanic vote and

in congressional district 18 Martinez received over 70% of the vote. On the other hand, white crossover voting for Hispanic candidates tended to be higher than white crossover voting for black candidates. In the 1990 general election, for example, Martinez received over 45% of the Anglo vote statewide, and a majority of the white vote in proposed congressional district 17. In proposed congressional district 18, however, only about 30% of the Anglos voted for Martinez. Hispanic turnout was lower than either black or white turnout. For example, in the 1990 general election less than 16% of the Hispanic voting age population turned out to vote.

Equalizing percentages:

Because minority communities tend to have fewer members of voting age and tend to participate in elections at a lower rate than whites, courts have recognized the need to create "supermajority" minority districts. However, the courts and the Justice Department have accepted that there is no fixed number—65 percent or otherwise—at which a district becomes an effective minority district.[2] A jurisdiction-specific analysis must be conducted to determine the minority population necessary to give minorities an equal opportunity to elect candidates of choice. Using estimates of black, Hispanic and white participation rates, "equalizing percentages" were calculated. An equalizing percentage is the percentage black or Hispanic voting age population needed to equalize white and minority turnout in the district on election day.

The equalization percentages for blacks and whites varied depending on the district, but fell in the range of 50% to 60% black voting age population. For proposed

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[2] See Kimball Brace, Bernard Grofman, Lisa Handley and Richard Niemi, "Minority Voting Equality: The 65 Percent Rule in Theory and Practice" in *Law and Policy*, Volume 10 (1), January 1988.

congressional district 20, because blacks turnout at a higher rate than whites, the equalization percentage is less than 50%. In congressional district 15, the equalization percentage ranges from 55% (1990 general) to slightly over 58% (1988 general election). The equalization percentages for Hispanics are considerably higher, ranging from about 60% to 90% Hispanic voting age population. For example, in congressional district 17 the equalizing percentage ranges from 58% in the 1986 general to 70% in the 1990 general. In congressional district 18, because Hispanic turnout is even lower, the percentage Hispanic voting age population necessary to equalize Hispanic and Anglo turnout ranges from 73% to 75%, depending on the election.

Conclusion:

The state house plan, SJR 2-G, creates 15 effective black districts and 9 effective Hispanic districts, as well as another majority Hispanic district that will probably elect a Hispanic-preferred candidate. The congressional plan, CS/HB 1-E, creates two effective black congressional districts and one effective Hispanic congressional district—as well as another Hispanic congressional district that will probably elect a Hispanic to office. In comparison to the existing state house and congressional districts, both of these plans represent an enhancement with respect to the ability of minority voters to participate in the political process and elect candidates of their choice in Florida.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No. 92-40015-WS

MIGUEL DE GRANDY, *et al.*,
Plaintiffs,
and

GWEN HUMPHREY, *et al.*,
Plaintiffs-Intervenors,

-vs-

T.K. WETHERELL, in his official capacity, *et al.*,
Defendants.

T.K. WETHERELL, in his official capacity, *et al.*,
Third-Party Plaintiffs,

-vs

WILLIAM P. BARR, as Attorney General
of the United States of America,
Third-Party Defendant.

Case No. 92-40131-WS

FLORIDA STATE CONFERENCE OF
NAACP BRANCHES, *et al.*,
Plaintiffs,

-vs-

LAWTON CHILES, in his official capacity, *et al.*,
Defendants.

REPORT AND RECOMMENDATION OF SPECIAL MASTER ON CONGRESSIONAL REDISTRICTING PLANS

May 18, 1992

Pursuant to the Three-Judge Court's April 6, 1992 Order Appointing Special Master, I respectfully submit a recommended congressional redistricting plan for Florida. *See* Appendix A (Report to the Special Master by the Independent Expert Witness) at Attachment A (Maps of the Independent Expert's Proposed Plan) and Attachment G (Statistics for Independent Expert Plan) [collectively "Independent Expert Plan"]. I recommend the Independent Expert Plan (Plan 308) because it comports with the United States Constitution and the Voting Rights Act, 42 U.S.C. § 1973. In particular, the Independent Expert Plan best serves the purposes underlying Section 2 of the Voting Rights Act by providing racial and language minorities a full and effective opportunity to elect candidates of their choice.

I stress that my endorsement of the plan, drawn by Independent Expert Professor M. David Gelfand, is based upon my own independent and careful consideration of the relevant law and the entire record, including the following: the maps, statistics, and other data describing the numerous plans; supporting expert reports and legal memoranda; six full days of hearings over which I presided; and voluminous exhibits. In recommending the Independent Expert Plan, by refereince I adopt as my own the factual findings and legal conclusions set forth in his Independent Expert Report. *See* Appendix A. Where necessary, I have provided additional findings of fact and conclusions of law below in support of the recommendation.[1]

Before proceeding, I pause to recognize the historic importance of the present occasion. For more than one

[1] The scores of exhibits and transcripts (11 volumes) are in the possession of the Clerk of Court, United States District Court, Northern District of Florida, Tallahassee.

hundred years, discriminatory practices such as poll taxes, secret ballot boxes, segregated schools and at-large election schemes have precluded or limited the ability of minorities in Florida to participate in the political system. Yet, during the past two weeks I had the honor of presiding over six days of congressional redistricting hearings in which the principal focus of virtually every party and amicus curiae was the enhancement of opportunities for racial and language minorities for full and effective political representation. How far we've come!

I also note that in my twenty-six years on the United States District Court bench, I have, by random assignment, handled a number of cases involving the protection of minority rights. My first such assignment involved the desegregation of the Dade County School System, the fourth largest in the nation. The most recent concerned the United States' policy of interdicting and repatriating Haitians fleeing from political persecution in their homeland. Such cases are particularly difficult because of their legal and social complexity and the compressed time frame in which they often are presented. As in the past, I am guided by the applicable law and greatly assisted by the numerous able counsel and experts. In this case, both point me toward a result that will increase the fair and effective representation of racial and language minorities in the halls of Congress.

I. PROCEDURAL BACKGROUND

On January 14, 1992, the opening of the 1992 Regular Session of the Florida Legislature, a group of registered voters from around the state, including Miguel De Grandy, a member of the Florida House of Representatives (collectively "De Grandy plaintiffs"), filed the initial underlying action. The complaint against various state House and Senate officials and the Governor, Secretary of State and Attorney General of the State of Florida alleged malapportionment of Florida's United States congressional

and state legislative districts and urged the federal court to assert jurisdiction to redistrict and reapportion the state.[2] On January 20, 1992, Chief United States District Judge William Stafford of the United States District Court for the Northern District of Florida empaneled a Three-Judge Court ("Court") in this district to hear the action. On January 23, 1992, plaintiffs filed their first amended complaint. After briefing and oral argument, on February 19, 1992 the Court granted defendants' motions to dismiss the complaint based on lack of subject matter jurisdiction.

On March 9, 1992, plaintiffs filed their second amended complaint. On March 13, 1992, the Regular Session of the Florida Legislature ended without enactment of either a congresisonal redistricting or legislative reapportionment scheme. On March 27, 1992, the Court denied all motions to dismiss and set an expedited schedule for purposes of adopting congressional and legislative schemes no later than May 29, 1992. On March 31, 1992, the Court made clear that its March 27 Order did not enjoin or preclude the State of Florida, its Legislature, its Supreme Court, or any state officer from timely effecting proper congressional redistricting or legislative apportionment.

On April 2, 1992, pursuant to Article III, Section 16, of the Florida Constitution, Governor Lawton Chiles called a Special Session of the Florida Legislature in order to accomplish legislative reapportionment. On April 10, 1992, the Florida Legislature adopted Senate Joint Resolution 2-G, which reapportioned the Florida's state House and Senate districts. Though the House did pass such a plan, the Legislature as a whole was unable to

[2] "Reapportionment" is the redistribution among political subunits of available legislative and congressional seats. "Redistricting" is the drawing of new constituency boundaries. *See* Bryant, Giddings & Kaplan, *Partisan Gerrymandering: A New Concern for Florida's 1992 Reapportionment*, 19 Fla. St. U.L. Rev. 265, 265 n.3 (1991).

enact a congressional redistricting plan. In the meantime, this case proceeded.

On April 7, 1992, the Florida State Conference of the National Association for the Advancement of Colored People Branches and a number of individual African-American voters (collectively "NAACP") filed a similar suit against the same defendants enamed in the De Grandy complaint, alleging that Florida's malapportioned congressional and legislative districts dilute the voting strength of African-American voters. The Court consolidated the two cases into the present one.

The Court also granted leave to the following parties to participate in this action as intervenors or amici: amicus curiae Simon Ferro, State Chairman of the Florida Democratic Party; plaintiff-intervenor Gwen Humphrey, et al.; plaintiff-intervenor Darryl Reaves, et al.; amicus curiae Common Cause; amicus curiae Florida AFL-CIO; amicus curae Craig James; amici curiae The Cuban American Bar Association and the Coalition of Hispanic Women; defendant-intervenor Alzo Reddick; amicus curiae Daniel Webster; plaintiff-intervenor Jim Bacchus and plaintiff-intervenor Andy Ireland.

On April 17, 1992, the parties, intervenors, and amici curiae filed their proposed redistricting plans with supporting expert reports and legal memoranda. On the same date, the Attorney General of the State of Florida filed a Notice of Submission of Senate Joint Resolution 2-G on legislative redistricting to the United States Department for review under Section 5 of the Voting Rights Act. Also on that day, the Court implemented alternative timetable, bifurcating the proceedings into two sets of hearings, one for congressional redistricting and one for legislative reapportionment. On April 30, 1992, the Court struck down the existing congressional scheme as unconstitutional. On May 13, 1992, the Court stayed the portion of this case dealing with legislative reapportionment in light of validation of Senate Joint Resolution 2-G

by the Florida Supreme Court and pending preclearance review of the reapportionment by the United States Department of Justice.

Turning to the background for this Report, on April 6, 1992, the Court appointed me as Special Master in this case. In the absence of a legislatively enacted congressional redistricting plan, the Court directed me to consider and evaluate congressional redistricting plans for Florida and to recommend to the court a plan "which comports with the United States Constitution and the requirements of the Voting Rights Act, 42 U.S.C. § 1973, *et seq.*" April 6, 1992 Order Appointing Special Master at 3. The Court authorized me either to adopt and recommend one of the numerous plans proposed by parties and other interested persons or to recommend a different plan based upon the evidence and my expertise.

For assistance in this very complex process, on April 24, 1992 I appointed Professor M. David Gelfand as an Independent Expert and directed him to review and evaluate the plans and to recommend either a plan submitted by a party or a plan of his own formulation. No party objected to his appointment or assignment.[3] During the week of May 4, 1992, I conducted hearings and received evidence on the merits of numerous plans. On May 14, 1992, Professor Gelfand submitted an Independent Expert Report, which evaluated the plans and recommended Independent Expert Plan 308, which was drawn from several of the plans submitted. *See* Appendix A at 18-34 (evaluating various plans); *see also* Attachments; Independent Expert Exhibits 1-8. The following day, the parties cross-examined Professor Gelfand regarding the Independent Expert Plan for several hours. After listening

[3] I mention this because one or more parties objected to the more than two dozen persons suggested by me or one of the parties to serve as the Independent Expert to evaluate the state Senate and House reapportionment plans.

closely to the cross-examination and reviewing the transcript, I find nothing that undermines his recommendation.

II. ADDITIONAL LEGAL CONCLUSIONS

When a legislative body fails to enact redistricting legislation, "it becomes the [very] unwelcome obligation of the federal court to devise and impose" a redistricting scheme. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). My review of the relevant caselaw and the record evidence suggests that the approach recommended by the Independent Expert is appropriate. *See* Appendix A at 8-18. Accordingly, the plans are properly evaluated in light of the two mandatory legal criteria: population equality and the racial fairness standard, *see, e.g., Hastert v. State Bd. of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991); *Major v. Treen*, 574 F. Supp. 325, 342 n.22 (1983) (three-judge court); *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, No. 79,674, slip op. 3, 12-13 (Fla. May 13, 1992) [hereafter "*In re SJR 2G*"]; *In re Reapportionment of the Colorado General Assembly*, 1992 WL 48569 (Colo., Mar. 13, 1992); *Wilson v. Eu*, 823 P.2d 545, 549, 551 (Cal. 1992).[4] The plans also may be evaluated in light of additional permissive criteria such as contiguity, compactness, respect for traditional boundaries, maintaining communities of interest, and encouraging party competitiveness.[5] With respect to these legal criteria, I find it necessary to discuss Setcions 2 and 5 of the Voting Rights Act further.

[4] The demographic composition of the voting age population ("VAP") of a district is appropriately considered in determining whether it is an effective district. A supermajority of the VAP is required for an Hispanic district, due to the large number of noncitizens and generally lower voter registration rates among Hispanics in Florida.

[5] I note that the Independent Expert did not consider the effect of redistricting on incumbents. *Accord Wilson v. Eu*, 823 P.2d 545, 1992 Cal. LEXIS 6, at *8 (Cal. 1992).

as they bear upon the mandatory "racial fairness" requirement.

A. *Section 2 and Racial Fairness*

A court-made plan must not have the intent or effect of diluting the votes of racial or language minorities. That is, the plan must not dilute minority voting strength. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 27 (1982) (Senate Report on 1982 Amendments to the Voting Rights Act), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 204 [hereafter "Senate Report"]; *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985); April 6, 1992 Order Appointing Special Master at 3.

Congress enacted the Voting Rights Act of 1965 pursuant to authority granted by the Fifteenth Amendment to the United States Constitution. Section 2 of the Act provided that "[n]o voting qualifications or prerequisites to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973 (Supp. III 1965-1967). The Voting Rights Act was later enlarged to cover language minorities, including Hispanics. 42 U.S.C. § 1973b(f) (1976).

Until 1980, those challenging apportionment plans under the Voting Rights Act were not required to prove deliberate discrimination in order to succeed. However, in *County of Mobile v. Bolden*, 446 U.S. 55 (1980), a plurality of the United States Supreme Court held that under the Voting Rights Act a plaintiff was required to prove discriminatory intent on the part of the legislators in order to establish that an apportionment scheme violated section 2. *Id.* at 60-61. In response to *Bolden*, Congress amended section 2 by including a "results" standard for determining whether an apportionment scheme violates section 2. Pub. L. No. 97-205, 96 Stat. 131, 134 (1982). Under the 1982 amendment, a violation of section 2 exists where the "totality of circumstances" reveals that "the political process leading to nomination or election . . . are not equally open to participation by members of a [racial or language minority] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (1982).[6]

In the Senate Report accompanying the bill to amend the Voting Rights Act, the Judiciary Committee delineated the following "typical factors" that might be probative of whether the "totality of the circumstances" supports a finding of a section 2 violation:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to

[6] Section 2 provides in full as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) [regarding language minority groups], as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other member of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1982).

register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals; and

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982); *see Solomon v. Liberty County*, 899 F.2d 1012, 1015-16 (11th Cir. 1990). As a result of Congress's 1982 amendment to section 2, a plaintiff may establish a section 2 violation if a redistricting plan has the discriminatory effect of diluting minority voting strength. *See, e.g., Jeffers v. Clinton*, 730 F. Supp. 196, 204 (E.D. Ark. 1989); *Jordan v. Winter*, 604 F. Supp. 807, 811-12 (N.D. Miss. 1984).[7]

[7] The 1982 amendment to the Voting Rights Act was first considered by the United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), a case involving a section 2 challenge to certain multi-member districts for the North Carolina legislature. The Court held that plaintiffs challenging an at large or multi-member system must prove three threshold criteria: (1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that the minority group is politically cohesive; and (3) that bloc voting by the white majority usually defeats the minority's preferred candidate. *Id.* at 50-51. Because the present proceeding involves an evaluation of proposed single-member plans, rather than a challenge to an existing at-large plan, *Gingles* is not dispositive. As Professor Theodore Arrington explained, *Gingles* "doesn't quite fit" in the present situation. Tr., vol. III at 42; *see also In re SJR 2G*, No. 79,674 at 29 (Shaw, J., dissenting).

The present situation is unique. Because the legislature failed to enact a redistricting scheme, there has not been an outright challenge to an operative plan. Additionally, time constraints preclude the type of factually intensive adjudication required in a traditional section 2 challenge. *See Gingles*, 478 U.S. at 45-46. Nevertheless, all the parties and amici curiae agree that section 2 must, at a minimum, *be considered* in crafting the redistricting plan. Tr., vol. II at 22. Moreover, the Court has instructed me to "recommend to the court a congressional redistricting . . . plan for Florida which comports with . . . the requirements of the Voting Rights Act, 42 U.S.C. § 1973 (1982) *et seq.*" *See* Order Appointing Special Master at 3. The parties, however, remain divided over the question of the extent to which I should consider section 2 in the present proceedings.

I have reviewed the relevant caselaw for guidance in the little time available. *See, e.g., In re SJR 2G*, No. 79,674 at 12-22, 31-41 (considering section 2 in context of validating legislative reapportionment scheme); *Burton v. Sheheen*, No. 3:91-2983-1, at 44 (D.S.C. May 1, 1992) (considering section 2 in section 5 case to extent possible because it would be "anomalous . . . to adopt plan which immediately lends itself to attack under section 2"); *Wesch v. Hunt*, No. 91-0797, 1992 WL 45533,

at *7-8 (S.D. Ala. March 9, 1992) (concluding that full-scale section 2 analysis unnecessary where the parties agreed that a significant African-American majority district should be created); *Wilson v. Eu*, 823 P.2d 545, 547 (Cal. 1992) (involving congressional and legislative redistricting case where the three special masters "endeavored to draw boundaries that will withstand section 2 challenges under any foreseeable combination of factual circumstances and legal rulings"); *Edge v. Sumter County School Dist.*, 775 F.2d 1509, 1510 (11th Cir. 1985) (holding that district court in section 5 proceeding could not validly adopt reapportionment plan without determining whether plan complied with section 2); *Connor v. Finch*, 431 U.S. 407, 425 (1977) (finding it imperative for district court to attempt to draw plan that complies with established constitutional standards and which avoids new constitutional challenges); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 646 (N.D. Ill. 1991) (analyzing proposed congressional redistricting plans for discriminatory effects under terms of section 2).

Based on my review of the caselaw, the testimony of experts, the parties' legal memornda, the parties agreement that I should "respect minority concentrations," Tr., vol. II at 23-24, and Florida's history of discrimination and its adverse effect upon minority access to the political system, *see infra*, III.A., I conclude that the law supports the drawing of a minority district where, in light of minority concentrations and community of interests, such a district can reasonably be drawn. Because all of the proposed plans include at least one African-American majority VAP district and two Hispanic supermajority VAP districts in south Florida, *see* Appendix A at Attachment C; Indep. Exp. Ex. 3; Senate Exs. 4-14; Tr., vol. II at 23-24, this conclusion affects only the question of whether to draw additional minority districts elsewhere in Florida. *See Wesch v. Hunt*, 1992 WL 45533, at *7-8. Specifically, in light of the parties' agreement and the Court's

order directing me to recommend a plan that comports with the Voting Rights Act, the present section 2 inquiry should center on the principal issues which divide the parties: whether, in addition to the agreed-upon African-American majority VAP district, the redistricting scheme should include a second African-American majority VAP district; and whether, instead of or in addition to a second African-American majority VAP district, one (or more) African-American "influence districts"[8] should be drawn.

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[8] In *Thornburg v. Gingles*, the United States Supreme Court stated in a footnote that it had "no occasion to consider whether section 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections." *Gingles*, 478 U.S. at 46-47 n.12.

Recently, however, the United States Supreme Court recognized the possibility of an "influence" vote-dilution claim by a minority voter group too small to constitute a majority. *Chisom v. Roemer* —— U.S. ——, 111 S. Ct. 2354, 2365 n.24 (1991). Justice Scalia commented in his dissent that "minorities who form such a small part of the electorate in a particular jurisdiction that they could on no conceivable bases 'elect representatives of their choice' would be entirely without section 2 protection." *Id.* at 2371 (Scalia, J., dissenting). In response, the majority stated that the dissent erroneously assumed "that a small group of voters can never influence the outcome of an election." *Id.* at 2365 n.24.

Based the footnote in *Chisom v. Roemer*, courts have recognized the viability of section 2 claims made by minority groups who constitute less than a majority. *See, e.g., Wilson v. Eu*, 823 P.2d 545, 1992 Cal. LEXIS 6 (Cal. 1992) (recognizing legal basis of section 2 "influence" claims as "sufficiently strong" to consider in drawing court-ordered redistricting plan); *Armour v. State of Ohio*, 775 F. Supp. 1044, 1052 (N.D. Ohio 1991) (sustaining section 2 claim regardless of whether minority group large enough to form a majority in either of two districts); *see also West v. Clinton*, No. 91-2237, 1992 U.S.Dist. LEXIS 3058, at *8 (W. D. Ark. March 12, 1992) (assuming legal viability of influence district theory); *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), (allowing

The present parties supporting influence districts argue that those districts with less than a majority African-American VAP have the potential to elect candidates of their choice. Those advocating the creation of a second majority district instead contend that creation of influence districts at the expense of a second majority African-American VAP district will result in less minority voter influence. *See, e.g.*, Defendants' Margolis and Gordon Post-Hearing Memoranda at 4-5. For the reasons discussed below, I find that the latter approach more effectively furthers the goals of section 2 under the circumstances of the present case.

Congress clearly intended that section 2 provide a "complete remedy" for dilution of minority voting strength and a "full opportunity" for minorities to participate and elect candiates of their choice. *See* S. Rep. No. 417, 97th Cong. 2d Sess. 31 (1982); *see also Kirksey v. Board of Supervisors*, 554 F.2d 139, 148-50 (5th Cir.) *cert. denied*, 434 U.S. 968 (1977).[7] In order to provide a complete "remedy" and a full opportunity to participate, minority representation in a district must be sufficiently high. In testifying about the risks of having a district with a minority voting age population that is too low, Professor Arrington explained that although a "black can win in a district that doesn't have a black majority, . . . the object is to create districts where the black can win without having to go before the white power structure [to] get

influence claim), *cert. denied*, 111 S. Ct. 681 (1991). *But see Turner v. Arkansas*, 784 F. Supp. 553, 564 (E.D. Ark. 1991) (finding no actionable section 2 claim for failure to create influence district).

[7] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

their approval, and that's what you want to draw if you can." Tr., vol. III, at 57.[8]

Similarly, as Professor Gelfand notes in his Independent Expert Report, "accepting a plan in which minority groups can only 'influence' elections, merely perpetuates, albeit in a somewhat different manner, the submergence of Florida's African Americans in districts composed of bloc-voting whites," unless the level of African-American influence is sufficiently strong. Appendix A at 13. Thus, creation of minority influence districts can result in an electoral scheme which does not allow minorities a full opportunity to elect the candidate of their choice if the minority VAP is too low.[9]

A number of courts have addressed the issue of whether the size of a particular minority district is sufficient to further the goals of section 2. For example, in *Kirksey*, the court rejected a court-ordered plan which fragmented a concentrated minority voting community so that no district contained an African-American VAP majority. *Kirksey*, 554 F.2d at 149. The court found that the "predictable effect" of the plan was to decrease the participation of African-American voters so that they had no realistic opportunity to elect a candidate of their choice. *Id.* at 150.

The court in *Wilson v. Eu* recognized the propriety of creating minority influence districts to maximize the voting potential of geographically compact minority groups.

[8] I should note that it is the race of the voter, not the race of the candidate, that is critical.

[9] At the hearing, Professor Arrington further testified that "it should be obvious to everyone that blacks are going to have a better influence in a district where they constitute 40 percent of the voting age population than they are in a district where they constitute ten or twenty percent. . . . I don't think you are getting any significant influence for the black community until you get well above 30 percent. . . ." Tr., vol. III at 84.

Wilson, 1992 Cal. LEXIS 6, at *11 (citations omitted). Yet *Wilson* is consistent with the *Kirksey* approach. Unlike *Kirksey*, the minority influence districts in *Wilson* were of an "appreciable size" so that the voting potential of minorities would be maximized rather than diluted, even without a majority voting age population. *Id.* Also, the precise question presented here—whether a majority VAP district is more effective than an influence district—was not presented in those cases.

In *Ketchum v. Byrne*, 740 F.2d 1398, 1413 (7th Cir. 1984), the Seventh Circuit determined that creation of a super-majority rather than a majority ward was necessary to provide minorities with a reasonable opportunity to elect a representaitve of their choice. The court stated that "[t]here is simply no point in providing minorities with a 'remedy' for the illegal deprivation of their representational rights in a form which will not in fact provide them with a realistic opportunity to elect a representative of their choice." *Id.* at 1413.

In summary, both the expert testimony and the relevant caselaw support the conclusion that, under the circumstances of the present case, the creation of a second African-American VAP majority district is preferable to the creation of additional influence district. However, this does not mean that an influence district should not also be drawn where the minority concentration is sufficiently strong.[10] *See Wilson v. Eu*, 1992 Cal. LEXIS 6, at *8.

B. *Section 5 of the Voting Rights Act*

The other relevant provision of the Voting Rights Act is section 5, 42 U.S.C. § 1973(c), which applies to coun-

[10] Professor Arrington testified that if it is "not possible to draw a black majority district, but it is possible to concentrate the black population in order to draw a district in which blacks would be very influential, then I think you have an obligation to do that." Tr., vol. III at 13.

ties "covered" by section 4. *See* 42 U.S.C. § 1973(b). Florida has five "covered" counties: Collier, Hardee, Hendry, Hillsborough and Monroe.

For legislatively adopted plans, section 5 requires that any change of voting procedures in covered counties be precleared by the United States District Court for the District of Columbia or by the United States Attorney General. A change affecting voting may be rejected under section 5 if it results in a retrogression, that is, if the change makes members of racial or language minority group worse off than they were before the change with respect to their ability to participate effectively in the electoral process. *See Beer v. United States*, 425 U.S. 130 (1976); *see also Lockhart v. United States*, 460 U.S. 125 (1983).

Unlike legislatively adopted plans, preclearance is not required for a court-ordered congressional redistricting plan. *McDaniel v. Sanchez*, 452 U.S., 130, 138 (1981); *see also* 28 C.F.R. § 51.18 (1991) (holding court-ordered changes affecting voting not subject to section 5 preclearance requirements, unless they reflect policy choices of submitting authority.). Nevertheless, courts must be cognizant of the section 5 requirement that voting changes not have the purpose or effect of denying or abridging the right to vote on the basis of race or language. 42 U.S.C. § 1973(c); *McDaniel*, 452 U.S. at 148-49. Therefore, any redistricting plan should avoid retrogression with regard to the voting strength of racial or language minorities.

In evaluating a redistricting plan's retrogressive effects on "covered" counties, it is important that the court consider the overall plan. Recently, the Supreme Court of Florida explained that, "in restructuring all of the district lines, there is bound to be some retrogression in minority voting strength in some districts. It is more appropriate to look at the overall plan to see whether or

not it discriminates against minorities." *In re SJR 2G*, No. 79,674 at 17.

There are at least two reasons why the effect of a redistricting plan on Florida's five covered counties cannot be examined in a vacuum. First, Florida has acquired four additional congressional seats. The redrawing of district lines to include four new districts while adhering to the one-person, one-vote requirement affects many counties throughout the state, including section 5 counties. For example, under the existing districting scheme, Hillsborough County's Hispanic and African-American populations are represented in two districts; by contrast, under almost all of the proposed redistricting plans, Hillsborough's minority populations would be represented in four districts. *See* Appendix B (Hispanic and Black Populations by County, Current & Proposed Districts: Section 5 Counties).

Second, as discussed above and in the Independent Expert Report, all plan proponents have attempted to craft plans that comply with Section 2 of the Voting Rights Act. The configuration and location of each plan's proposed minority districts also affect the minority representation in the covered counties. For example, Hendry County's Hispanics fare better in Margolis' District 21 than in the existing District 12, with an increase in representation from 7.54% to 65.03%. On the other hand, African-American representation in District 21 decreases slightly in Margolis' plan. By contrast, the Independent Expert Plan provides for a substantial increase in African-American representation in Hendry County (from 15.54% in the current district to 51.65% in District 23 and 4.02% in District 16) and a slight increase in Hispanic representation (from 7.54% in the existing district to 9.37% in District 23 and 6.31% in District 16). In all but one of the proposed plans (NAACP), there is a decline in representation of Hispanics in Monroe County. In addition, all of the proposed plans provide for only marginal changes, both positive and negative, in representation for Hispanics and African-Americans in Hardee County. In sum, no single proposed plan satisfies the requirements of section 5 better than any other plan.

As with the other proposed plans, the Independent Expert Plan results in a decrease in representation for some minorities in covered counties and in increase in other such counties. More importantly, however, the overall plan substantially strengthens minority representation in Florida. As discussed above, the Independent Expert Plan effectively furthers the goals of the Voting Rights Act. Viewing the effect of the Independent Expert Plan as a whole, I find that it is not retrogressive for purposes of section 5. *See In re SJR 2G*, No. 79,674 at 17. It creates the first two African-American majority VAP districts in the history of Florida, plus two Hispanic VAP supermajority districts and an African-American influence district.

III. ADDITIONAL FINDINGS OF FACT

As noted earlier, based on an independent review of the record, the undersigned adopts by reference the factual findings of the Independent Expert. *See* Appendix A. Nevertheless, the undersigned deems it necessary to make additional findings of fact.[11]

A. *Senate Factors*

As noted above, *Gingles* is not directly on point in this case because we are considering numerous proposed plans rather than a challenge to an existing plan. Nevertheless, a short discussion of the Senate Factors is appropriate because it underscores the importance of not adopting a

[11] Any finding of fact which may be conclusion of law shall be considered a conclusion of law. Conversely, any conclusion of law which may be a finding of fact shall be so considered. The same shall apply for the Independent Expert Report.

plan which "immediately lends itself to attack under section 2." *Burton v. Sheheen*, No. 3:91-2983-1, at 44 (D.S.C. May 1, 1992); *see In re SJR 2G*, No. 79,674 at 32-34 (Shaw, J. dissenting).

1. *History of Official Discrimination*

Florida has a long and unfortunate history of official discrimination against minorities that has influenced their ability to participate in the political process. *Accord id.* at 32-34 (Shaw, J. dissenting) (discussing historical material of which, Court in present case has taken judicial notice). Our state constitution of 1885 authorized the imposition of poll taxes, required segregated schools and prohibited interracial marriages. *See* Fla. Const. art. VI, § 8 (1885); *id.* art. XII, § 12; *id.* art. XVI, § 24. As recently as 1967, section 350.20, Florida Statutes, provided in part:

> The Florida public service commissioners may prescribe reasonable rules and regulations relating to the separation of white and colored passengers in passenger cars being operated in this state by any railroad company or other common carrier.

Section 1.01(6), Florida Statutes (1967), further stated in part:

> The words "negro," "colored," "colored persons," "mulatto" or "persons of color," when applied to persons, include every person having one-eighth or more of African or negro blood.

In addition, this Court has taken judicial notice of recent cases from around the state striking down such discriminatory election practices as at-large election schemes, white primaries, majority-vote requirements, and candidate filing fees. As explained by Dr. Darryl Paulson, expert witness for the NAACP, such official state discrimination has adversely affected the ability of minorities to participate in the political process. Tr., vol. I at 70.

2. *Racially Polarized Voting*

Racially polarized voting exists throughout Florida to varying degrees. Agreement among the parties, statistical analyses and expert testimony support this conclusion. Dr. Mark Stern, expert witness for the NAACP, stated this fact simply:

> Black voters in Florida generally vote as a cohesive racial bloc for the black candidate when there is a black versus white choice on the ballot for a given office. White voters generally vote against the black candidate and vote as a racial bloc for the white candidate when there is a black versus white choice of candidates on the ballot for a given office.

Florida Supreme Court Justice Leander Shaw recently reached the same conclusion. *See In re SJR 2G*, No. 79,674 at 34-37 (Shaw, J., dissenting).

3. *Other Areas of Discrimination*

Minorities also have borne the effects of discrimination in areas such as education, employment and health care. The Florida Constitution of 1885 demanded the separate schooling of "[w]hite and colored children." Fla. Const. art. XIV, § 24 (1885). The 1990 census figures demonstrate that among persons sixteen years or older, African-Americans are more than twice as likely to be unemployed as whites. As Dr. Paulson explains, "the poverty rate for black Floridians is more than three times that experienced by whites." He also states that "[v]oting studies have consistently indicated the strong relationship between socio-economic status and political participation. So, in addition to the legal barriers that have prevented blacks from fully participating in the political system, the legacy of racism has created economic barriers that impede black political success."

4. *Election of Minority Officials*

Minorities have had very little success in being elected to either the United States Congress or the Florida Legislature. No African-American has represented Florida in the United States Congress in over a century. Only one Hispanic congressperson serves from Florida. African Americans were unable to elect a single representative to the state House from 1889 until 1968. No African-American representative to the state Senate was elected from the time of Florida's inception until ten years ago. No Hispanic state senator was elected until four years ago. *See In re SJR 2G*, No. 79,674 at 34-37 (Shaw, J., dissenting).

B. Relative Merits of Plan Characteristics

As noted, the undersigned adopts the factual findings of the Independent Expert regarding the relative merits of the various plans. *See* Appendix A at 18-39.

1. *Influence versus Majority District*

The De Grandy, Humphrey and Reaves plaintiffs have each proposed an African-American influence district in Central Florida and in the Panhandle. The proposed Central Florida influence district would likely draw African-American voters from up to seven other congressional districts, which would diminish minority voting strength in the other districts. Tr., vol. I, at 113. Moreover, the Central Florida influence district links Tampa and Orlando communities, which are likely to have competing economic interest. *Id.*, vol. VIII at 27.

The same plaintiffs also proposed an influence district in North Florida. Unless the Panhandle district proposed by De Grandy and Reaves is stretched across an area of largely white populated counties, it does not appear to have enough African-American voters to provide a reasonable opportunity of electing candidates of their choice.

Id. Furthermore, because the white populations in Panhandle areas are subject to growth in the coming years, the African-American influence in a district spanning those counties may decrease accordingly. *Id.* at 203; *see also*, Tr., vol. III at 73-74 (discussing dilution problems caused by white in-migration).

In addition to having districts that are less susceptible to vote dilution caused by white in-migration, other reasons support choosing African-American majority districts over influence districts. For example, as Professor Moreno testified, the relative difficulty that African-Americans may have raising money makes it important to place African-Americans in a district in which they can elect a candidate of their choice. Tr., vol. IV at 309-11. Majority districts are likely to be more effective than influence districts in this regard.

In short, the creation of two African-American majority VAP districts would provide a better opportunity for African-American voters to elect an African-American candidate. Tr., vol. III at 13, 74-75, as would the creation of another influence district with a sufficiently large African-American population, *id.* at 13. Therefore, I find that an approach which creates two African-American VAP majority districts plus one African-American influence district is the most desirable approach, particularly since, in light of minority concentrations and communities of interest, the districts can reasonably be drawn.

2. *South Florida Supermajority Hispanic District*

Florida's Hispanic population is internally divided in a way that its African-American population is not because it is diverse in terms of race and nationality. Tr., vol. III at 10. However, there is a cohesion among its subdivisions; for example, Dade County's Cuban-American population constitutes a solid community of interest. Tr., vol. IV at 286-87. Therefore, the Margolis plan's proposed

Hispanic districts - both of which join Dade County's Cuban-American population other Hispanics and with non-Hispanics and one of which extends over five counties --unnecessarily splinter a solid community of interest. I do note that the Margolis plan's African-American district in South Florida (District 23) has a higher African-American VAP majority than the Dade County district in the Independent Expert Plan. However, the Margolis plan offers this higher African-American percentage by fracturing the Dade Hispanic community. Moreover, the Margolis plan does not include the third African-American district which is created by the Independent Expert Plan; that third district (District 23) is an influence district which has a substantial African-American majority population of 51.6% and an African-American VAP of 45.6%.

3. *Northeast Florida African-American Majority District*

Several parties proposed districts in Northeast Florida which contained African American majority VAP populations. The evidence showed that due to the cohesiveness of the African-American population, African Americans may constitute a community of interest even if they live in different municipalities. Tr., vol. III at 35, 75-76. Therefore, an African-American majority district, such as the Independent Expert Plan's District 3, may spread over a number of counties without damaging a community of interest. Of course, there are a number of non-racial factors considered in the makeup of a community of interest, e.g., similar economic status, background and aspirations. Tr., vol. I at 112.

4. *Effectiveness of Independent Expert's Districts 3, 17 & 23*

Based upon my review of the evidence in this case, I conclude that Districts 3 and 17 of the Independent Expert's Plan would provide African-American voters with

the opportunity to participate in the political process and to elect congressional candidates of their choice.[12] In addition, I find that the evidence supports the creation of District 23, the "influence" district proposed by the Independent Expert.[13]

In order to obtain independent verification of the effectiveness of these three African-American districts, I asked the House computer staff to run the District Summary for Selected Statewide Races with Black Candidates. *See* Appendix C. This summary reflects the outcomes for each proposed plan for selected statewide races that were identified at the hearings as being racially polarized. *See* Tr., vol. I at 43.

A review of the summary for the Independent Expert Plan indicates that the African-American candidate does well in all of the elections in Districts 3, 17 and 23. The very lowest figure is 55 percent, while the highest is 74 percent. Indeed, all of the figures for the total votes for the African-American candidate in these districts are much better than the candidate's statewide total. In sum, the figures demonstrate that all three reasonably drawn African-American districts proposed by the Independent Expert can be effective. Thus, the Plan should increase the fair and effective representation of racial and language minorities in the halls of Congress.

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[12] The evidence presented in support of the NAACP and Margolis plans, both of which propose a district very much like District 3, demonstrates the effectiveness of District 3. Similarly, the evidence presented in support of the Lawyers' Committee and De Grandy plans supports the effectiveness of District 17, which is identical to their proposed districts.

[13] District 23 is similar to influence districts proposed by NAACP and De Grandy. In fact, District 23 has a higher African-American VAP percentage than NAACP's proposed district. Consequently, evidence supporting the NAACP and De Grandy districts also supports District 23.

IV. CONCLUSION

Based upon the foregoing legal conclusions and factual findings, as well as those made by the Independent Expert and adopted herein, I respectfully recommend that the Court adopt the Independent Expert Plan (Plan 308)[14] for Florida's new congressional redistricting scheme.[15]

DONE AND ORDERED at Tallahassee, Florida this 18th day of May, 1992.

s [Illegible]
Senior United States District Judge
Acting as Special Master

cc: Counsel of record
Three-Judge Court

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[14] This plan is described in pages 34-39 of Appendix A to this Report. Maps of the districts, for the state as a whole, and for selected areas, appear in Appendix A at Attachment A; key statistics appear in Appendix A at Attachment G. Additional maps and further statistics are contained in Independent Expert Exhibit 1, with large maps presented as Independent Expert Exhibits 4-6. Finally, technical descriptions of tract and block assignments are contained in Independent Expert Exhibits 2A and 2B and are computed on the electronic tapes distributed to the parties on May 14, 1992.

[15] Implicit in my recommendation is that the Court include in its congressional redistricting order the curative rules found at Attachment D of the Independent Expert Report.

EXCERPTS FROM PLAINTIFFS' THIRD AND FOURTH AMENDED COMPLAINTS

COUNT VIII
JOINT RESOLUTION OF APPORTIONMENT — VIOLATION OF SECTION 2, VOTING RIGHTS ACT

132. Plaintiffs reallege Paragraphs 1 thorugh 131 of this complaint and incorporate those paragraphs herein by reference.

133. The joint resolution of legislative reapportionment, SJR 2-G, purports to create eleven districts in the Florida House of Representatives which contain a majority or African-American voting age population. The joint resolution also purports to create nine districts in the House and which contain a majority voting age population of Hispanics. The racial and ethnic population concentrations of the State of Florida are such that, if the state is divided into equally populated districts which respect communities of interest and follow other non-discriminatory plan drawing criteria, there exists, as a minimum, thirteen districts in the Florida House in which African-Americans constitute a voting age majority in politically cohesive, reasonably compact districts. Similarly, at a minimum, there exists eleven districts which would contain a majority of Hispanic voting age population. These are also politically cohesive and reasonably compact districts.

134. Elections within Florida are characterized by patterns of racial and ethnic block voting. African-American candidates for public office receive substantial support from voters in areas where African-American predominate, but such candidates generally are not successful in obtaining election because of a lack of support from other voters. Similarly, Hispanic candidates for public office receive substantial support from voters in the geo-

graphic areas were Hispanics predominate, but such candidates generally are not successful in obtaining an election because of a lack of support from other voters.

135. African-Americans and Hispanics, have historically been the victims of official discrimination perpetrated by state and local government throughout Florida. Such discrimination has included discrimination touching on the right to register, vote and participate in the political process.

136. Socio-economic statistics demonstrate that African-Americans and Hispanics continue to bear the effects of discrimination in Florida in such areas as education, employment, income and housing.

137. The joint resolution of apportionment, SJR 2-G, unlawfully fragments cohesive minority communities and otherwise impermissibly submerges their right to vote and to participate in the electoral process.

138. For these and other reasons, the political processes leading to nomination and election in the proposed legislative districts in SJR 2-G are not equally open to participation by African-American and Hispanic citizens, and African-Americans and Hispanics have less opportunity than others of the electorate to participate in the process and to elect represntatives of their choice.

139. Defendants and their predecessors were aware of past racially motivated vote dilution and had an opportunity to correct that dilution by creating a redistricting plan in conformity with the Voting Rights Act. Proposals were made which would have appropriately recognized minority voting strength, but were ignored or rejected in order to protect white incumbents. Instead, the Defendants intentionally designed the plan which will have the effect of protecting white anglo incumbent members of the Florida Legislature.

140. Unless the Court orders creation of a lawful and constitutional redistricting plan, African-American and

Hispanic citizens of Florida will suffer the deprivation of important rights and privileges by reason of their race and country of origin.

141. Specifically, SJR 2-G discriminates against African-Americans citizens in the following ways:

a. The African-American population in Escambia County was split into two districts, one of 30% black population and one of 14% black population. SJR 2-G deliberately fractures Escambia County's African-American population in order to protect white, incumbent representative, Speaker-designate Bo Johnson. Alternative plans encapsulate the black population in a relatively compact, cohesive, 40% black community of interest. This Section 2 violation has been mentioned in the Department of Justice preclearance letter of June 16, 1992;

b. In the Florida Panhandle area, the African-American population is split among seven districts with African-American populations ranging from 13% to 39%. This population has historically been fractured and submerged, and easily could be combined to exercise their influence to elect candidates of choice;

c. In the Jacksonville/Duval County area, proposed Districts 14 and 15 in SJR 2-G actually are retrogressive compared to District 16 and 17 created in 1982. In addition, adjacent minority population was not included, specifically to protect a white freshman incumbent. This minority population was fully encapsulated by the Special Master for the North Florida Congressional Minority seat, clearly signifying its cohesiveness and community of interest;

d. In the Alachua County-Putnam County area, SJR 2-G fractures the African-American population in three districts, 27, 29, and 33. This is a blatant attempt to submerge minority population to benefit white incumbents. This minority population was fully encapsulated by the Special Master for the North Florida Congressional

Minority seat, clearly signifying its cohesiveness and community of interest;

e. In the Hillsborough/Pinellas County area, SJR 2-G does not expand African-American influence in any way. In fact, the plan is slightly retrogressive. Given the fact that the United States Department of Justice and the United States District Court for the Northern District of Florida have found that the Downtown Tampa and Downtown St. Petersburg African-American populations are politically cohesive and share a community of interest, there is no reason that these interest groups should be split. Any effort to split these groups results in a dilution of African-American voting strength in the Tampa Bay area. The Pinellas-Hillsborough-Manatee district in SJR 2-G has a black population less than its black population in 1980. Adjacent black population could be added to cure this dilution. Similarly, an additional effective minority seat could be created in Polk County;

f. In the Orange County area, the African-American community has been fractured with approximately a 22% black population submerged into District 38 which benefis a white incumbent. Population is directly adjacent to proposed District 39 and could have been included in District 39 to enhance African-American's voting rights. In Volusia, Seminole, Brevard Counties an alternative proposal was rejected which would have created an effective minority district. Instead, SJR 2-G fragments the minority community in order to protect white incumbent districts, including Speaker T.K. Wetherell and recent party switcher, Frank Stone. The proposed district Plan 292 could be coupled with the submerged population in District 38 to create an additional majority-minority seat. This community of interest was encapsulated in the Special Master plan for Congress. The Congressional Redistricting Plan adopted by the United States District Court recognizes the large community of interest shared by African-American citizens

in the Orange-Seminole-Volusia County areas. Populations could have been combined to create an additional effective African-American seat;

g. SJR 2-G Districts 77, 78, 86, and 73 split significant black populations which could have been combined to create an additional effective African-American seat in these areas;

h. In the Broward-Dade County area, SJR 2-G spilts the black population into several districts. Districts neighboring Districts 93 and 94 in SJR 2-G contain substantial minority populations which were intentionally fragmented to weaken the ability of these African-Americans to elect candidates of choice. In fact, District 94 would not have been carried by Jesse Jackson in the Presidential preference primary. Adjacent black population was intentionally submerged to protect white incumbents, which could be added to make both of these districts effective; This minority population was fully encapsulated by the Special Master for the North Florida Congressional Minority seat, clearly signifying its cohesiveness and community of interest

i. In Dade County, black citizens were fragmented in District 118 and District 119. Many African-American seats were also packed with many Hispanic citizens which dilutes the ability of African-Americans to elect candidates of choice.

The aforementioned examples do not include all instances of Section 2 violations throughout the State of Florida, but are meant to give representative examples of obvious Section 2 violations.

142. SJR 2-G discriminates against Hispanic-American citizens in several ways, including, but not limited to:

a. Hispanic voters are packed in Districts 110 (82.1%), 111 (75.7%), and 114 (77.5%) and further submerges Hispanic voters in black minority districts, specifically, District 103 (62% black, 27.8% Hispanic), Dis-

trict 109 (63.0% black, 34.5% Hispanic), and District 118 (34.5% black, 27.1% Hispanic). Less egregious examples of packing, but still having the same dilutionary effect, are District 104 (58.7% black, 16.1% Hispanic), Anglo District 105 (19.2% Hispanic), Anglo District 106 (32.3% Hispanic), District 108 (66.2% black, 16.0% Hispanic). SJR 2-G appears to purposefully pack, fracture and submerge Hispanic population deliberately to dilute Hispanic voting strength;

b. Nine Hispanic-American majority districts were created in SJR 2-G; however, other plans submitted to the Legislature show that eleven majority-Hispanic-American seats can be created in the Dade County area. This dilution of Hispanic voting strength is accomplished by the aforementioned packing, fracturing and submergence with the intent and purpose of protecting white incumbents;

c. The Hispanic population was also split into districts which encompass areas outside of Dade County and waste Hispanic votes.

143. The legislative redistricting plan in SJR 2-G violates Section 2 of the Voting Rights Act, Title 42, U.S.C. § 1973, *et seq.*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

C. A. No. ———

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF FLORIDA, a State of the United States; T.K. WETHERELL, Speaker of the Florida House of Representatives; GWEN MARGOLIS, President of the Florida Senate; LAWTON CHILES, Governor of the State of Florida; ROBERT BUTTERWORTH, Attorney General for the State of Florida; PETER R. WALLACE, Chairman of the House Reapportionment Committee; JACK GORDON, Chairman of the Senate Reapportionment Committee; JIM SMITH, Secretary of State for the State of Florida,
Defendants.

COMPLAINT

June 23, 1992

The United States of America alleges that:

1. This is a complaint brought on behalf of the United States of America pursuant to 42 U.S.C. 1973, 42 U.S.C. 1973c, 42 U.S.C. 1973j(d), and 28 U.S.C. 2201, to enforce rights guaranteed by the Fourteenth and Fifteenth Amendments to the United States Constitution.

2. This Court has jurisdiction of this action pursuant to 28 U.S.C. 1345 and 42 U.S.C. 1973j(f).

3. Defendants are the State of Florida and officials thereof who have duties and responsibilities under the

laws of that state to reapportion the Florida Legislature. Defendant T.K. Wetherell is Speaker of the Florida House of Representatives. Defendant Gwen Margolis is President of the Florida Senate. Defendant Lawton Chiles is Governor of the State of Florida. Defendant Robert Butterworth is the Attorney General for the State of Florida. Defendant Peter R. Wallace is Chairman of the House Reapportionment Committee. Defendant Jack Gordon is Chairman of the Senate Reapportionment Committee. Defendant Jim Smith is Secretary of State for the State of Florida and is responsible under the laws of that state to oversee the conduct of elections. All defendants are sued in their official capacities.

4. The Florida Legislature is comprised of a 120-member House of Representatives and a 40-member State Senate. Members of the House are elected concurrently to two-year terms. Members of the Senate are elected to four-year terms. However, terms of office for members of the Florida Senate are staggered such that half of the Senate runs for a two-year term and half of the Senate runs for a four-year term at the next election following a reapportionment, such as 1992. Members of the Florida House and Florida Senate are elected from single-member districts.

5. The State of Florida has experienced a significant increase in the number and percentage of Hispanic residents during the period from 1980 to 1990. According to the 1980 Census, the population of the State was 9,746.324, of whom 858,158 (8.80%) were Hispanic. According to the 1990 Census, the State's population has grown to 12,973,926, of whom 1,574,143 (12.17%) are Hispanics. In Dade County, the Hispanic population has grown from 580,994 in 1980 to 953,407 in 1990—an increase from 1980 of 64.1 percent. More than 60 percent of the State's Hispanic population resides in Dade County.

6. At the time of the planning for the redistricting on the basis of the 1990 Census, the defendants and members of the Florida Legislature were aware of the significant increase in Hispanic population that had occurred during the period from 1980 to 1990.

7. The Florida State Legislature passed a reapportionment plan ("SJR 2-G") to elect the members of the State Legislature on April 10, 1992. On May 13, 1992, the Florida Supreme Court issued a declaratory judgment determining the validity of SJR 2-G reapportioning the legislature of the State of Florida.

COUNT I

8. The redistricting plans for the members of the Florida Legislature dilute the voting strength of black citizens and Hispanic citizens in several areas of the State, including the following areas:

Dade County

a. In Dade County, Hispanic persons comprise a slight majority (50.5%) of the voting age population. The redistricting plan enacted by the State of Florida for the *House of Representatives* creates 20 districts in the Dade County area. The State's House plan fragments the Hispanic population concentrations such that Hispanics constitute a majority of the voting age population in only nine (9) districts;

b. With respect to the State *Senate* plan, the redistricting plan enacted by the State of Florida creates seven (7) districts in the Dade County area. The State's proposed Senate plan fragments the Hispanic population concentrations such that Hispanics comprise a majority of the voting age population only in three (3) districts;

c. The racial and ethnic population concentrations existing in the Dade County area are such that, if the Dade County area of the State is divided into equally populated legislative districts which respect communities of interests and follow other nondiscriminatory plan-drawing criteria, Hispanics would constitute a significant voting-age majority of the population in two additional districts in the House of Representatives, and one additional district.

d. In the Pensacola-Escambia County area of the State, the redistricting plan enacted by the State of Florida for its House of Representatives divides Escambia County into four (4) House districts. The State's House plan fragments the black population in this area among several districts such that blacks comprise less than 26 percent of the voting age population in each of these four districts. Alternative plans have been developed which unite the black population concentrations in Pensacola-Escambia County into one district in which black citizens would have a meaningful opportunity to effect elections for the House of Representatives.

9. Elections in the State of Florida, including elections for positions in the State Legislature, are characterized by patterns of racial and ethnic bloc voting.

a. Hispanics are politically cohesive. Hispanic candidates for public office generally receive substantial support from Hispanic voters, but such candidates often are not successful in obtaining election because of a lack of support from other voters.

b. Blacks are politically cohesive. Black candidates for public office generally receive substantial support from black voters, but such candidates often

are not successful in obtaining elections because of a lack of support from other voters.

10. Blacks and Hispanics in Florida have, historically, been the victims of official discrimination perpetrated by the State of Florida and local governments therein. Such discrimination has included discrimination touching on the right of black citizens and the Spanish-speaking and other language minorities to register, vote and participate in the political process.

11. Socioeconomic statistics demonstrate that blacks and Hispanics in Florida continue to bear the effects of discrimination in such areas as education, employment, income, health and housing. The depressed socioeconomic status of blacks and Hispanics in the State of Florida has a disparate and injurious effect on the ability of black and Hispanic citizens to participate equally in the political process and to have an equal opportunity to elect a candidate of their choice to the State Legislature.

12. Under the totality of circumstances, and in the context of the factual circumstances described in paragraphs 4 to 14, *supra*, the redistricting plans for the Florida House of Representatives and the Florida State Senate deprive Hispanic citizens and black citizens in the State of Florida of an equal opportunity to participate in the political process and to elect candidates of their choice to the State Legislature.

COUNT II

13. The United States realleges the facts set out in paragraphs 4 through 12, above.

14. The State's proposed Senate plan in the Hillsborough County area divided the politically cohesive minority populations in the Tampa and St. Petersburg areas such that there were no senatorial districts in which minority persons constituted a majority of the voting age population. On June 16, 1992, the Attorney General

interposed a timely objection to the Senate plan pursuant to Section 5 of the Voting Rigi[illegible]ct, 42 U.S.C. 1973c. The Senate plan is legally unenforceable. Alternative plans for the State Senate are available which remedy the Section 5 objection interposed by the Attorney General. These alternative plans unite the minority populations in Tampa and St. Petersburg to provide minority voters an effective opportunity to elect their preferred candidate to the State Senate.

15. With regard to both Counts I & II, unless enjoined by this Court, the defendants will fail to devise, and implement in 1992, plans for their State House and Senate plan which meet the requirements of federal law.

WHEREFORE, the United States prays that a three-judge Court be convened pursuant to 28 U.S.C. 2284 and 42 U.S.C. 1973c, and thereafter enter a judgment:

(a) Declaring that the redistricting plans for the Florida House of Representatives and the Florida Senate constitute voting standards, practices, or procedures within the meaning of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and that those redistricting plans violate Section 2;

(b) Declaring that the redistricting plan for the Florida State Senate is a standard, practice, or procedure with respect to voting within the meaning of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, and that the plan has failed to satisfy the preclearance requirements of Section 5;

(c) Enjoining defendants, their agents and successors in office, and all persons acting in concert with them from administering, implementing or conducting any election for members of the Florida House of Representatives and the Florida State Senate pursuant to the statutorily invalid plans; and

(d) Ordering defendants to devise new plans for the election of the Florida House and Florida Senate that meet the requirements of federal law. If the defendants fail to devise such plans, the Court should order plans into effect.

Plaintiff further prays that the Court grant such additional relief as the interests of justice may require, together with the costs and disbursements of this action.

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Attorney General

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The District Court Opinion entered May 29, 1992 is printed at p. 77a in the Appendix to the Jurisdictional Statement filed in *Wetherell v. De Grandy*, No. 92-519 (September 22, 1992).

The District Court Order and Judgment entered July 2, 1992 (Senate) is printed at p. 4a in the Appendix to the Jurisdictional Statement filed in *Wetherell v. De Grandy*, No. 92-519 (September 22, 1992).

The District Court Order and Judgment entered July 2, 1992 (House) is printed at p. 1a in the Appendix to the Jurisdictional Statement filed in *Wetherell v. De Grandy*, No. 92-519 (September 22, 1992).

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

(Title Omitted in Printing)

AFFIDAVIT OF THEODORE S. ARRINGTON, PH.D.

Theodore S. Arrington, Ph.D., first being duly sworn, deposes and says:

1. I am a citizen and resident of Mecklenburg County, North Carolina, and a judicially recognized expert in districting, reapportionment, and racial and partisan patterns in elections.

2. I have examined the document titled "The Voting Rights Act and Redistricting in Florida" produced by Election Data Services (EDS). There are a number of unanswered questions about the exact methods used in producing the data presented in this document. Nevertheless, assuming that proper methods were employed by EDS, it is possible to use these data to determine whether elections are racially polarized in Florida.

3. I have summarized the EDS data in Table 1 (page 2) of this affidavit. From Table 1 we can see that most elections involving Afro-Americans and Hispanics are racially polarized. Both Black/White contests and Hispanic/White elections are more than twice as likely to be polarized as not. Even contests involving only minority candidates are more likely to be polarized than not. It is clear that voting in these kinds of contests in Florida are usually racially polarized. Further examination of the EDS data indicates that the minority community is usually cohesive in these contests.

TABLE 1
SUMMARY OF ELECTION DATA SERVICES
POLARIZED VOTING DATA

	Black/ White Contests	Hispanic/ White Contests	No White Candidate
Polarized Voting:			
Minority Candidate Lost	18	10	
Minority Candidate Won	12	12	
Unclear Who Won	1	0	18
Total	31	22	
Voting Not Polarized:			
Minority Candidate Lost	7	5	
Minority Candidate Won	6	4	
Unclear Who Won	0	0	13
Total	13	9	
Grand Total	44	31	31

4. The question of the extent to which minority candidates lose because of racial polarization is more complicated in this case than in the *Gingles* case cited by EDS. In *Gingles* all of the jurisdictions had at-large voting in districts (County units) where black voters constituted a minority of the population. However, many of the Florida districts examined in the EDS data are majority black or Hispanic districts. Thus the win/loss ratios presented in Table 1 partially reduce the evidence in the EDS data for the necessity of constructing districts in which blacks or Hispanics are a firm majority of the voting age population if these groups are to be able to participate equally in the political process and elect candidates of their own choice.

5. Many of the election contests listed in the EDS data are not reflected in the figures in Table 1, because they did not present data from either homogeneous case analysis or from ecological regression for more than one racial group. The reason for the absence of some of these figures is not

clear. The data for one election were omitted because they are obviously in error.

6. The algebraic analysis presented by EDS to determine the size of the minority population which is necessary to form a minority majority district provides, at best, a rough minimum number for such districts. Ecological regression and homogeneous case analysis—even if done by the best accepted current standards—forms a rough estimate of turnout and racial voting. This is not clear from the EDS data which shows the figures to the nearest one-tenth of a percent. The use of existing registration data to form districts would also ignore the mobilization possibilities which exist when minority control districts are created. Thus I believe that it is best to form and evaluate minority districts on the basis of the minority percentage of the voting age population, and try to form as many districts as possible with a minority VAP at or above 55%.

7. I am more than 18 years of age and fully competent to testify to the things and matters herein stated.

This is the 28 day of April, 1992.

/s/ Theodore S. Arrington
THEODORE S. ARRINGTON, Ph.D

(Notary Stamp Omitted in Printing)

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

(Title Omitted in Printing)

AFFIDAVIT OF THEODORE S. ARRINGTON, PH.D.

Theodore S. Arrington, Ph.D., first being duly sworn, deposes and says:

1. I am a citizen and resident of Mecklenburg County, North Carolina, and a judicially recognized expert in districting, reapportionment, and racial and partisan patterns in elections.

CREDENTIALS OF THEODORE S. ARRINGTON

2. In the case of *Ralph W. Gingles, et al. v. Rufus L. Edmisten, et al.* (590 F.Supp. 345 [E.D.N.C.]), I testified as an expert witness and was so certified by the three judge panel that heard that case. Indeed, my testimony was cited by the Court in their unanimous opinion, which was affirmed by the United States Supreme Court (*Thornburg, et al. v. Gingles, et al.*, 106 S.Ct. 2752 [1986]). My testimony in that case included the presentation of proposed districts for the North Carolina General Assembly, which were drawn under my supervision and presented to the General Assembly by members of that body, and the effects of elections that could have been held in those districts on the success of black candidates.

3. I testified by affidavit as an expert witness in the case of *Kelly Alexander, Jr. v. James G. Martin, et al.* (Civil Action 86-1048-CIV-5) in the United States District Court (E.D.N.C. Raleigh Division). In that case I prepared

testimony on the racial effects of statewide elections for Superior Court in North Carolina. The General Assembly of North Carolina responded to that suit by creating judicial subdistricts for the nomination of Superior Court Judges in counties where majority black subdistricts were possible (see NOGS 7A-41). This response was similar to the proposals I offered in my testimony (except that I suggested election as well as nomination from these districts), and the subdistricts themselves were similar to those I drew for that testimony.

4. I am currently serving as an expert witness in the case of *Republican Party of North Carolina, et al. v. James G. Martin, et al.*, Civil Action No. C-87-779-G (1988). In that case I have testified by affidavit that the procedure of statewide elections of Superior Court judges dilutes the votes of Republicans while there are Republican voter majorities or near majorities in some districts and therefore has the effect of consistently degrading the votes of Republican voters and also degrades their influence on the political process as a whole in violation of constitutional rights.

5. In the combined cases of *Burton, et al. v. Sheheen, et al.* (No 3:91-2983-1), *South Carolina Reapportionment Advisory Committee, et al. v. Campbell, et al.* (No. 3-91-3310-1) and *Blanton, et al. v. Sheheen et al.* (No. 2-91-3635-1) in the United States District Court (S.C., Columbia Division [1992]), the three judge panel declared that a deadlock existed in the redistricting system in that state and proceeded to draw districts for the General Assembly and Congress for South Carolina. I was an expert witness for the coalition of plaintiffs in that case, testifying by affidavit and in the courtroom about the effects of delay in establishing districts and about the racial effects of various districting plans.

6. I have been hired by plaintiffs in the case of *Mackinnon v. Government of Prince Edward Island* before the

Supreme Court of Prince Edward Island, Canada. In that case I have prepared a redistricting proposal for the provincial legislature which follows one-person-one-vote standards. I will present testimony in court to support the idea that such districting is practical and necessary under the *Canadian Charter of Rights and Freedoms*.

7. In my vitae are listed several other voting rights cases in which I have been or currently am an expert witness.

8. I have served in an advisory capacity for a number of local governmental bodies to advise them on election systems, drawing districts, or reapportionment of existing districts. In this capacity I have helped these units bring their election systems into compliance with both the letter and the spirit of the Voting Rights Act.

9. I have edited one book and coauthored two monographs, published over twenty five articles, and delivered numerous papers in the last twenty years. Most of these works concern aspects of partisan and racial effects on voting and most of them concentrate on the South. Included in my research are several published studies of campaign finance. This work also examined racial and partisan variable in single and multi-seat elections, and was funded by the Foundation of the University of North Carolina at Charlotte and the State of North Carolina.

10. From 1979 to 1991 I was active in the administration of elections, having been appointed six times by the N.C. State Board of Elections to the Mecklenburg County Board of Elections. In the summer of 1985 I was elected Chairman of that Board and reelected to that post in 1987 and again in 1989. As Chairman of the three member Mecklenburg County Board, I was responsible for the admistration of the largest and most complex system of elections in North Carolina with a quarter of a million registered voters. Under my membership and chairmanship, the Mecklenburg Board continued its long tradition as a leader in establishing outreach programs to increase

voter participation in general and minority participation in particular. Many of the programs that have been mandated by various southern states, including North Carolina, had already been in place in Mecklenburg for years.

11. Candidates and campaign managers for local, state, and national office seek my advice and counsel on campaign techniques and procedures. I give training seminars and workshops on campaigning, and comment widely in the electronic and print media as an expert on elections. The demand for my services from these various sources derives directly from my knowledge of campaigning and elections, especially the partisan, racial, and districting factors that shape election results.

12. Commercial publishers request my services as reader for textbooks in my field on a regular basis, and I am a referee for such leading political science journals as *The American Political Science Review*, *The Journal of Politics* and *The American Journal of Political Science* among others. I help these editors to judge the quality of research on general politics, partisan and racial voting patterns, and the nature of multi-seat and single-member district election system.

13. My curriculum vitae will be submitted to the court as a separate document.

ONE-PERSON-ONE-VOTE ANALYSIS OF PROPOSED STATE AND COMMON CAUSE DISTRICTS

14. The courts have applied a standard of virtual population equality of census counts for Congressional districts (*Kirkpatrick v. Presler*, 394 U.S. 526 [1969] and *Karcher v. Daggett*, 462 U.S. 725 [1983]).

15. The courts have given us a maximum population deviation for state and local districts which is less strict than for Congressional districts (*Mahon v. Howell*, 410 U.S. 315 [1972]; *Gaffney v. Cummings*, 412 U.S. 735

[1973]) and *White v. Regester*, 412 U.S. 755 [1973]). A usual standard of 10% deviation from the largest to the smallest district is sometimes suggested as usual for state and local districts created by a legislative authority (*Brown v. Thomson*, 462 U.S. 835, 842-43 [1983]). When the courts do the districting, however, the ten percent deviation no longer applies:

> A court-ordered plan . . . must be held to higher standards than a State's own plan. With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features . . .
> . . . [U]nless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature . . . must ordinarily achieve the goal of population equality with little more than *de minimis* variation. Where important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan . . . with minimal population variance cannot be adopted. Chapman v. Meier, 420 U.S. 26-27; partially quoted in *Connor v. Finch*, 431 U.S. 417-410.

16. As indicated above, the total deviation standard in Congressional districting is zero. Deviation is defined as the difference between the largest and smallest district expressed as a percentage of the ideal district size (size of the state divided by number of districts). The deviation percentages for the Common Cause Congressional proposal is the zero percent deviation given as the judicial standard. As indicated below, the Common Cause plan achieves this absolute minimum deviation without unduly sacrificing other values such as provision for minority race and language minority opportunity districts, keeping other kinds of community of interests together, making compact districts, and so forth.

17. For the state legislative districts a comparison of the State plans with the Common Cause plan is possible. Taking the State Senate first, the deviation in the State plan is .45%. While one-half of one percent is not a large total deviation, it is important to note that the Common Cause plan has zero deviation. Yet the Common plan with its much lower total deviation avoids splitting 44 counties; and, as will be shown below, does a better job of providing opportunities for black citizens to participate equally in the political process and elect candidates of their choice. The Common Cause districts are at least as compact as the State's senate districts, and are likely to be more politically fair as well.

18. The State House of Representative plan drawn by the State has a total deviation of 2%. The Common Cause plan has a somewhat larger total deviation of 6.43%. However, the mean deviation in the State's plan is .52%, while the mean deviation in the Common Cause plan is .63%. Thus the plans taken as a whole have a roughly similar deviation. The largest deviations in the Common Cause plan are made specifically to avoid cutting up counties. There are 24 counties which are not divided on the Common Cause plan. Indeed, except for District 68 which is the largest district, the total deviation would be about 3%. District 68 was made somewhat larger than other districts in the Common Cause plan to keep the counties in that area intact. The desire to keep from unnecessarily dividing counties is a valid criteria in districting. It is not, of course, as important as the provisions of the Voting Rights Act; and does not take precedence over a reasonable one-person one-vote standard. In this case, however, it is clear (as shown below) that the Common Cause plan for the House is superior to the State plan in terms of provision for minority voters, and the total deviation in the Common Cause plan is not out of line with typical deviations in state legislative districting.

COMPLIANCE WITH THE VOTING RIGHTS ACTS BY PROPOSED STATE AND COMMON CAUSE DISTRICTS

19. The social and economic position of black citizens and language minorities in Florida disadvantages them in political terms. Compared to other citizens, they have lower family income, less education, higher rates of unemployment, higher rates of infant mortality, etc. Indeed, virtually every indicator of social and economic well being shows that blacks and language minorities are disadvantaged relative to other citizens. Historically blacks in Florida have suffered from both *de jure* and *de facto* segregation. One could compile a long list of both State initiated and private actions which have historically discriminated against blacks. This includes exclusion from the franchise and other forms of political participation and current social conditions is that blacks and language minorities are greatly disadvantaged in the political arena. This gives them less opportunity to participate in the political process as a whole and to elect candidates of their choice. Compared to other citizens they have lower rates of voter registration and voter turnout, are less likely to contribute money to candidates, and are less likely to run for office or otherwise participate actively in the political process. When these factors are combined with racially polarized voting, blacks and language minorities face an enormous barrier to equal participation and ability to elect candidates of their choice. The political position of racial and language minorities in Florida is basically similar to that of blacks in North Carolina as identified by the Court in the *Gingles v. Edmisten* case (590 F. Supp. 345 [1984]).

20. Districting may be used to equalize the opportunity for blacks and Hispanics to participate in the political process taken as a whole and allow them to elect candidates of their choice. Failure to draw districts as indicated in the two rules given below would deny blacks

and Hispanics that equal opportunity to participate and elect candidates of their choice.

21. The first rule is that districts should not crack black and Hispanic voting strength. As utilized by many southern legislatures in recent years, this practice has the effect of giving minority voters no real political voice beyond choosing among white anglo candidates. The idea is to keep the proportion of the voting population which is black or Hispanic low enough to prevent them from being elected.

22. Second, it is important to avoid packing districts with more black or Hispanic voters than is necessary to give them an opportunity to elect candidates of their choice. Such packing reduces the influence of minority voters on the surrounding districts by reducing the minority vote there. Often it is possible to create two districts with an opportunity for minority citizens to elect candidates of their choice if neither one is packed with majorities which are too great.

23. The U.S. Supreme Court originally suggested a standard of 65% minority population (POP) and 60% voting age population (VAP) within a single district as necessary to provide a minority population with a reasonable opportunity to "exercise political control over that district" (*United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 [1977]). These "super-majority districts" compensate for the lower voting age population percentages, lower voter registration, and lower voter turnout found in minority communities. As the courts have said:

> A guideline of 65% of total population has been adopted and maintained for years by the Department of Justice and by reapportionment experts and has been specifically approved by the Supreme Court in circumstances comparable to those before us as representing the proportion of minority population reasonably required to insure minorities a fair opportunity to elect a candidate of their choice. (*Ketchum v.*

Byrne, 740 F.2d 1398, 1413-15, 9th Cir. [1984], cert. denied 471 U.S. 1135, [1985]).

On this same point also see *In re Congressional Districts Cases*, No. 8181 C 3915, slip op. at 14 (N.D. Ill., 23 November 1981); *Dickinson v. Indiana State Election Board* (7th Cir. 1991) 933 F. 2d 497, 503; *Romero v. City of Pomona, supra* 883 F. 2d 1418, 1452; *Solomon v. Liberty County, Florida* (11th Cir. 1990) 899 F. 2d 1012, 1018 (rehearing en banc); *McDaniels v. Mehfoud* (E.D. Virginia 1988) 703 F. Supp. 588, 592; *State of Mississippi v. U.S.*, 490 F. Supp. 569, 575 (D.D.C. 1979, three judge court), *affirmed* 444 U.S. 1050 (1980); and *Rybicki v. State Board of Elections*, 574 F. Supp. 1147, 1152 (N.D. Ill., 1983). Also see Brace, Grofman, Handley, and Niemi "Minority Voting Equality: The 65 Percent Rule in Theory and Practice" 10 *Law and Policy* 43 (1988).

24. Over the years experts have come to modify this rule somewhat in practice as Brace, Grofman, Handley, and Niemi indicate, because minority communities are now better organized and minority citizens more likely to register and vote than was true in an earlier era. It is not always necessary to have a 60% black voting age population (VAP) district to assure blacks the opportunity to elect candidates of their choice. Although a 60% black VAP is probably still a good goal, 55% black VAP is almost always enough for black citizens to have an opportunity to participate in the political process and elect candidates of their choice. One would certainly want a somewhat higher black VAP for Congressional districts than for the state legislature because of the greater organization and financing necessary to conduct a campaign at that level. In any case, it is clear that one would want to avoid having districts with more than 65% black VAP because such districts might be packed.

25. The situation with regard to Hispanics is somewhat more complex. The Hispanic population is diverse ethnically and racially, and there is not always the degree of cohesion that is present in the black population. Therefore, it is wise to keep the percentage of Hispanic voting age population relatively high to assure Hispanic participation. Hispanic VAPs in excess of 65% would not be unwise to assure Hispanic populations an opportunity to participate and elect candidates of their choice.

26. The higher the proportion of minority voters in a district, the greater the "influence." At some point "influence" becomes control, as indicated above. In the range below minority control the relationship between percent minority presence in the district and degree of influence is curvilinear. As the minority percentage in the district climbs from 0% the degree of influence is very slight. But the influence gradually builds in an upward curving fashion. At about the level of 30%, influence begins increasing rapidly with every 1% increase in percent minority. This curve of influence changes most rapidly as minority population becomes great enough to potentially nominate a minority candidate for one of the major parties. This kind of curve is common in many political situations. For example, it is the truncated bottom half of the "S" curve that typically describes the relationship between seats and votes for political parties in single member election systems.

27. If we wish to increase minority participation in the election process, we would want first to increase the number of minority control districts. Beyond that, the curvilinear relationship of influence to minority percentage suggests that the rest of the minority population should also be concentrated. Rather than cracking the remaining minority voters and splitting them into many districts. the districts should be drawn so as to form as many as possible with minority populations which are 55% to 60% minority VAP. Then we should try to

draw as many districts as possible with close to 55% minority VAP, and so forth. The majority/minority competition that often appears in districts that are "balanced" (i.e. 45-55% minority VAP) would increase minority interest and participation in the election process in those areas. Such a districting philosophy would provide for minority citizens—as much as possible—equality of participation in the political process taken as a whole and the ability to elect candidates of their choice.

28. In jurisdictions with manifest racial block voting, a history of racial and language group discrimination, and a present evidence of continuing social and economic disparity between white Anglos and Blacks and Hispanics, comparison of the plans in terms of racial and language group voting age population is desirable, for it is voting age population which is the basic unit that can be mobilized to produce minority voting majorities.

29. The Common Cause Congressional plan provides for one clear Black control district (#22), in which 60.4% of the voting age population is Black. There is also a district (#2) with a Black VAP of 36.4%. This second district is a weak influence district. The Black population in Florida appears to be so scattered, that additional effective Black control districts are difficult to draw.

30. There are two strong Hispanic control districts in the Common Cause Congressional plan. District 20 has an Hispanic VAP of 65.2%, and District 21 has a 69.9% Hispanic VAP. The Hispanic population is somewhat more concentrated than the Black population, but again additional effective Hispanic control districts are difficult to draw.

31. Table 1 (page 8) provides a comparison of Common Cause and State passed plans for the Florida legislature. The plans are compared using the minority VAP in the districts, and only those districts with more than 30% minority VAP are shown. Below the 30% level,

minority influence is negligible. The top portion of Table 1 shows the comparison for the State Senate. The State did not create a single clear Black control district for the Senate. Instead, they created two districts with a bare majority of blacks, and two other districts with some Black influence. Common Cause, on the other hand, drew one clear minority control district in line with the "supermajority" criteria enunciated in many court cases. They also drew three districts in which Blacks will be influential in determining the outcome of elections. The Common Cause approach is superior in that it provides for at least one district where Blacks can control the outcome without depending on white votes.

TABLE 1

COMPARISON OF MINORITY DISTRICTS IN PROPOSED PLANS RANK ORDERING OF CONTROL AND INFLUENCE DISTRICTS BY PERCENTAGE OF VOTING AGE POPULATION WHICH IS MINORITY

Institution:	Common Cause Plan		State Passed Plan	
Minority Group:	District	Minority VAP %	District	Minority VAP %
State Senate:				
Black	36	64.5	36	52.5
Districts:	8	41.7	30	51.7
	23	36.1	7	45.9
	32	34.4	40	34.5
Hispanic	39	79.5	39	76.1
Districts:	35	64.8	34	66.4
	38	63.1	37	64.2
State House:				
Black	97	67.9	108	60.5
Districts:	114	67.6	109	58.8*
	108	63.5	103	58.2*
	107	63.4	14	54.0
	15	58.6	84	53.2
	41	57.2	104	53.1
	64	55.6	59	52.0
	92	53.6	15	51.2
	17	52.8	39	50.2
	9	45.7	94	50.2

Institution: / Minority Group:	Common Cause Plan District	Common Cause Plan Minority VAP %	State Passed Plan District	State Passed Plan Minority VAP %
Black	54	35.8	93	50.0
Districts: (Cont'd)	113	34.2	55	46.9
	84	31.3	8	46.0
			118	31.7
Hispanic	117	83.7	110	83.6
Districts:	110	78.4	114	78.4
	109	75.3	111	76.6
	111	71.3	113	75.7
	105	70.8	117	60.2
	118	69.2	112	68.7
	115	67.4	102	65.7
	116	66.8	115	65.3
	104	60.6	107	63.8
	119	55.1	116	46.4
	106	35.1	109	38.4*
	59	31.1	58	31.0
			106	30.1
			103	30.0*

* These two districts appear in both Black and Hispanic lists for the state.

32. In terms of districts to increase Hispanic voters' opportunities to participate and elect, the State passed and Common Cause Senate plans appear to be quite similar.

33. The comparison of the State passed and Common Cause plans for the House of Representatives shows that the Common Cause plan is clearly superior (bottom of Table 1). The State passed a plan with only three house districts that have the minimal level of 55% Black VAP which would assure Black control, while Common Cause constructed seven such supermajority districts. Instead of creating at least a minimal number of Black "opportunity districts," the State opted to create a number of districts right at the 50% Black VAP level. These districts can only be considered "influence" districts.

34. Blacks typically register to vote at levels below that of the eligible white population, and the actual turnout of registered Blacks is typically lower than for registered whites. This "drop off" of Black participation means that a 50% Black VAP district will not have an effective Black voting majority.

35. The Common Cause and State passed House plans do not appear to be very different in terms of Hispanic districts. The list of Hispanic influence districts appears to be longer in the State plan, but this is deceptive. In the State plan Districts 109 and 103 have substantial Black majorities and substantial Hispanic minorities. Thus these two districts may be "packed" in the sense that the minority population in them is substantially more than is necessary for control. (Some Hispanics are Black, therefore I cannot determine whether these districts are packed from the data I have.) If the State is using the same districts for both Black control and Hispanic influence, the State effectively sets up a situation where minority groups have to compete with one another for influence. In any case, the list of minority control and influence districts created by the State is not as long as it looks because these two districts are listed twice.

CONCLUSION

36. In my professional opinion:

1. Although I have not seen any other Congressional plans for Florida using the 1990 census, the Common Cause plan is a reasonable plan providing opportunity for minority citizens to participate in the political process and elect candidates of their choice within a framework of districts that are exactly equal in terms of population. The districts are reasonably compact and were drawn to keep political communities of interest intact and to be fair to the political parties.

2. The Common Cause Senate plan is superior to the State passed Senate plan because it goes further in creating a Black control district and because it has no population deviation between the districts.

3. The Common Cause House plan is clearly superior to the State passed House plan, because it goes much further in creating Black control districts (seven versus three). Although the population deviations in the Common Cause plan are larger than in the State passed plan, this deviation is justified in terms of attempts to keep counties intact. Providing an opportunity for Black participation in the political process and to elect candidates of their choice is more important than the differences in population deviation between the State passed and Common Cause plans.

37. The data analyzed here are reliable and are of the kind that are usually relied upon by experts in this field to render opinions on the nature of legislative and congressional districts.

38. I am more than 18 years of age and fully competent to testify to the things and matters herein stated.

This is the 26th day of April, 1992.

/s/ Theodore S. Arrington
THEODORE S. ARRINGTON, Ph.D.

(Notary Stamp Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISRICT OF FLORIDA
TALLAHASSEE DIVISION

(Title Omitted in Printing)

REPORT TO THE SPECIAL MASTER BY THE INDEPENDENT EXPERT WITNESS

After finding exceptional circumstances in these consolidated cases, the Three-Judge Court of the United States District Court for the Northern District of Florida appointed The Honorable C. Clyde Atkins, Senior United States District Judge, Southern District of Florida, to serve as the Special Master. The Special Master was empowered to "consider and evaluate congressional redistricting and legislative reapportionment plans for Florida"; to hold hearings and receive evidence on these plans; and to recommend a redistricting plan "that a party or other interested party has proposed, or one that the Special Master has formulated based on the evidence and his expertise." Three-Judge Court's April 6, 1992 "Order Appointing Special Master," at 2-3, *De Grandy v. Wetherell* (No. 92-40015).

On April 24, 1992, Judge Atkins, in his capacity as Special Master, appointed me, pursuant to Rule 706, Federal Rules of Evidence, as the independent expert witness to review the proposed congressional redistricting plans for Florida and to present a report of my findings. His order further instructed me: "[I]f none of the plans appears adequate, [to] submit a proposed Congressional redistricting plan" of my own. The compressed time frame required that I perform these tasks between May 4 and May 14, 1992. *See* Special Master's April 24 "Order Appointing Expert Witness and Rescheduling Hearings,"

at 2, *De Grandy*; Special Master's May 8 "Order Memorializing Oral Ruling on Revised Dates," at 2, *De Grandy*. This Report is my response to those Orders.[1]

I. INTRODUCTION

I have reviewed the extensive legal memoranda (filed before, during, and after the hearings), expert reports and affidavits, other exhibits, arguments of counsel, and lengthy expert and lay testimony[2] presented in this case by the parties and the numerous amici curiae. I have also reviewed: the many proposed congressional redistricting plans; the maps, charts, overhead transparencies, voluminous statistics, and innumerable computer runs describing and comparing those plans and their variations; and the relevant rulings and orders issued by the Three-

[1] It is not without trepidation that I have undertaken the daunting task of evaluating, within a few days, plans that have taken the parties and the amici curiae months to prepare. Without in any way depreciating any of the many other experts who testified during the Hearings in this case, I observe that Professor Theodore Arrington analyzed the difficult and complex process of redistricting with an appropriate level of sophistication and humility. *See* Transcript of Hearings ["Tr."], vol. III at 4-97. I hope that I can approach his level of both. In particular, Professor Arrington was careful to observe that no one plan will ever be ideal. Tr., vol. III at 20. Similarly, I do not claim that the plan I recommend here is the only possible plan, though I do feel it has many virtues. *See* Part IV, below.

[2] Testimony by witnesses for the numerous parties and amici, along with extensive argument by their counsel, were presented in day-long Hearings before the Honorable C. Clyde Atkins from May 4th through 8th. On most days, the Hearings ran from 8:30 a.m. to 10:00 p.m. This allowed full participation by the many parties interested in this important process, while remaining within a compressed time frame dictated by the need to conduct the congressional elections on schedule. These Hearings produced a ten-volume transcript consisting of 2,198 pages, plus a huge collection of diverse exhibits of varying sizes and levels of technological sophistication.

Judge Court and by the Special Master.[3] Though counsel have zealously advocated the interests of their clients, often in a very adversarial manner, the extent of disagreement should not be overstated. Certain key factual and legal issues are beyond dispute in this case:

1. As a result of population increases from 1980 to 1990, Florida is entitled to twenty-three members in the upcoming 103rd United States Congress.
2. The current system, which contains only nineteen seats, is unconstitutional.[4] Attachment B contains a map showing the boundaries of the current congressional districts.
3. The Florida Legislature has failed to adopt a congressional redistricting plan, though a majority of the Florida House of Representatives did vote for a plan.
4. In this case, the demographic composition of the voting age population ["VAP"] of a district should be examined to determine whether or not it is an effective district. *See generally* Tr.; vol. III at 34-35 (Professor Arrington). *See also Solomon v. Liberty County*, 899 F.2d 1012, 1018 (11th Cir. 1990) (en banc) (Kravitch, J., specially concurring); *id.* at 1021 (Tjoflat, C.J., specially concurring).

[3] I have been ably assisted in this process by a political scientist/demographer (Dr. Douglas Rose), another law professor (Professor Terry Allbritton), several law clerks, and a small clerical staff. I was also given invaluable confidential, technical support by the Florida House of Representatives and Florida Senate computer analysts and technicians and by the staff of the Clerk of this Court. Naturally, I have made all policy decisions, and I take full responsibility for the analysis and conclusions contained in this Report. *See* Tr., vol. III at 104.

[4] *See* Three-Judge Court's April 30 "Order on Plaintiff's Summary Judgment Motion" at 2, *De Grandy*.

5. The "ideal" population size (to produce absolute population equality) for each of Florida's twenty-three new congressional districts is 562,-518.52 persons.[5]

6. All plans before the Special Master contain at least one district in which a majority of the VAP is African-American, plus two districts in which at least 64 percent of the VAP is Hispanic (that is, they are "supermajority districts"). *See* Attachment C; Tr., vol. I at 9. *See also* Stipulated Facts, ¶ 55.

7. A supermajority of the VAP is required for an Hispanic district to be effective, due to the large number of noncitizens and generally lower registration rates among Hispanics in Florida.

8. No African-American has been elected to Congress from Florida during this century, and the first Hispanic elected to Congress from Florida was elected in a special election held in 1989. *See* Stipulated Facts, ¶¶ 24-25.

9. The State of Florida has a history of legally enforced racial discrimination. For example, the Florida Constitution of 1885 provided for the racial segregation of schools, the collection of poll taxes, and anti-miscegenation laws. *See* Stipulated Facts, ¶ 43. Other statutes provided for segregation in railroad accommodations. *See id.*, ¶ 44 (citing Fla. Stat. § 350.20 (1967)). This discrimination is evidenced by the continuing need for contemporary supervision by a federal court of Dade County's School System in order

[5] As no fractional persons exist, an absolutely perfect zero population deviation is impossible for Florida's 1992 districts. That is, the lowest possible total deviation is one person, or .000177 percent. The deviations for the plans proposed in this case range from that minimum up to .07964%. *See* House Exhibit ["Ex."] 4, Tab 1.

to remedy past discrimination. *See* Stipulated Facts, ¶ 52.

10. This history of discrimination is reflected in the phenomenon of racially polarized voting, whereby African-Americans (or Hispanics) vote one way, and whites (or Anglos) vote another. *See Thornburg v. Gingles*, 478 U.S. 30, 68 (1986) ("The essence of a submergence claim is that minority group members prefer certain candidates whom they could elect were it not for . . . a white majority that votes as a significant bloc for different candidates."); *see also* Common Cause Ex. 6 at 5-6 ("Both Black/White contests and Hispanic/White elections are more than twice as likely to be polarized as not. Even contests involving only minority candidates are more likely to be polarized than not [in Florida.]"); Stipulated Facts ¶¶ 24-25, 51-92.

11. Five of Florida's counties—Collier, Hardee, Hendry, Hillsborough, and Monroe—are "covered" by the formulas contained in section 4 of the Voting Rights Act, 42 U.S.C. § 1973b(b) (1982). Therefore, if the Legislature had passed a congressional redistricting plan, the plan would have required "preclearance" by the United States Attorney General or the United States District Court for the District of Columbia under section 5 of the Act. *See* 42 U.S.C. § 1973c; 28 C.F.R. § 51.60(a), (b), & (c) (1990).[6]

The proposed congressional plans have traveled through these proceedings under a variety of names and numbers.[7] To reduce confusion, I will employ a uniform

[6] *See generally* Paul Hancock & Lora Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 Urb. Law. 379 (1985).

[7] Plans developed or stored in the Senate computer were given chronological numbers; those developed or stored in the House

set of titles to refer to the proposed plans.[8] The twelve plans are listed below, along with the various designations that have been used in this redistricting process, and the corresponding names that will be used in this Report:

A. NAACP plan (Plan 293), named after Plaintiff Florida State Conference of NAACP Branches.

B. De Grandy plan (Plan 212) and the second Reaves/Brown/Hargrett plan. These plans are exactly the same, and I will refer to them as the "De Grandy plan."

C. Humphrey plan (Plan 202) and the first Reaves/Brown/Hargrett plan (Plan 610). These two plans are exactly the same. They will be described here as the "Lawyers' Committee plan," because that is how they are designated on the House computer printouts and reports (where they are named after Humphrey's counsel, the Lawyers' Committee for Civil Rights Under Law).

D. Common Cause plan (Plan 40).

E. Wetherell plan (Plan 201). This plan, which was passed by the Florida House of Representatives but not by the Florida Senate, is sometimes described as the "House Plan" or "CS/HB 1-E" (Committee Substitute for House Bill 1E). I refer to it here by the last name of the Speaker of the House, Defendant/Third-Party Plaintiff T.K. Wetherell.

F. Margolis plan (Plan 287). This has, at times, been described as "one of the Senate plans," because its principal sponsor was Gwen Margolis, President of the Florida Senate. It is here referred to by her last name.

G. Gordon plan (Plan 279). This has also been described as "one of the Senate plans," because its principal sponsor was Jack Gordon, Chairman of the Florida Senate's Committee on Reapportionment. It is here referred to by his last name.

H. Reddick plan (Plan 296), named after Florida State Representative Alzo Reddick.

I. Ireland plan (Plan 285), named after Congressman Andy Ireland.

J. James plan (Plan 302), named after Congressman Craig James.

K. Webster plan (Plan 303), named after Amicus Daniel Webster.

L. AFL-CIO plan (Plan 295), named after the Florida AFL-CIO.[9]

Tables of basic statistics, describing the demographic composition and voting patterns for each district in each of these plans, appear in Attachments C and F. *See also* Senate Exs. 4-14 (color maps for each plan); Independent Expert's ["Indep. Exp."] Ex. 3 (filed with this Report).

II. CRITERIA USED TO EVALUATE THE PLANS

A. *Primary Criteria*

Federal law mandates that congressional redistricting plans must meet two primary requirements: the one-person, one-vote standard and the racial fairness standard.

computer were given names, generally reflecting the names of those who developed or sponsored them.

[8] This attempt at clarification is not intended to ignore the fact that several plans have multiple sponsors, who have made important contributions to this redistricting process.

[9] On the last day of the Hearings, the AFL-CIO withdrew its plan, in light of that plan's similarities to the Reddick, House, and Gordon plans. Tr., vol. VIII at 117-18.

See, e.g., Hastert v. State Bd. of Elections, 777 F. Supp. 634 (N.D. Ill. 1991); *Major v. Treen*, 574 F. Supp. 325, 342 n.22 (1983) (three-judge court); *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Section 1992*, No. 79,674, slip op. 3, 12-13 (Fla. May 13, 1992); *In re Reapportionment of the Colorado General Assembly*, 1992 WL 48569 (Colo., Mar. 13, 1992); *Wilson v. Eu*, 823 P.2d 545, 549, 551 (Cal. 1992).

1. Equally Populous Districts

To satisfy the one-person, one-vote requirement, a state's congressional districts must be drawn so that their populations are equal. *Wesberry v. Sanders*, 376 U.S. 1 (1964) (interpreting U.S. Const. art. I, § 2). Even *de minimis* deviations from exact population equality may be unacceptable, unless the deviations are necessary to achieve some critical state objective. *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (rejecting deviation of less than .07%). *See also Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) (only those population variances "which are unavoidable despite a good faith effort to achieve absolute equality or for which justification is shown" will be accepted).

The Florida Legislature has failed to adopt a congressional redistricting plan; therefore, any plan selected or produced by the *De Grandy* Three-Judge Court will be a court-made plan. Such a court-made plan should have only the most minimal deviation. *See Connor v. Finch*, 431 U.S. 407, 414 (1977); *Chapman v. Meier*, 420 U.S. 1, 26-27 (1964); *Hastert*, 777 F. Supp. at 644 (rejecting plan with a deviation of .00297%). As several plans introduced in this case have demonstrated, a bare minimum deviation of one person, or .000177 percent, is technologically possible for Florida's congressional districts. Therefore, the plan adopted by the *De Grandy* Three-Judge Court should meet that standard, unless a

greater deviation is necessary to ensure racial fairness. *See Hastert*, 777 F. Supp. at 644.

2. Racial Fairness

A court-made plan must not have the intent or effect of diluting the votes of racial or language minorities. That is, it must protect minority voting strength. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 27 (1982) (Senate Report on 1982 Amendments to the Voting Rights Act), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 204 [hereinafter "Senate Report"]; *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984); Three-Judge Court's April 6 "Order Appointing Special Master," at 3, *De Grandy*.

a. *Constitutional Considerations*

Intentional discrimination in electoral schemes is prohibited by the Fourteenth and Fifteenth Amendments to the United States Constitution. Intentional discrimination may be indicated by the failure to create an African-American-majority or Hispanic-majority district solely to protect white incumbents. *See Ketchum v. Byrne*, 740 F.2d 1398, 1407 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985); *Garza v. City of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991); *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1082, 1109 (N.D. Ill. 1982) (three-judge court). By contrast, protection of minority voting strength is a legitimate goal of redistricting. *United Jewish Orgs v. Carey*, 430 U.S. 144 (1977); *Garza*, 918 F.2d at 776; *Hastert*, 777 F. Supp. at 650-51.

b. *Section 2 Considerations*

Section 2 of the Voting Rights Act forbids any "state or political subdivision" to impose or apply any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or

abridgement of the right of any citizen . . . to vote on account of race or color," or membership in a language minority. 42 U.S.C. § 1973(a). There is an ongoing debate over the extent to which section 2 should be applied in cases such as the instant one, where the legislature has failed to redistrict, and, therefore, there has not been an outright challenge under the Voting Rights Act to an operative plan. Proponents on one side of this debate believe that a court engaged in congressional redistricting should undertake a full-blown section 2 analysis. *See Wilson*, 823 P.2d at 563 (special masters attempted to develop a plan "that will withstand section 2 challenges under any foreseeable combination of factual circumstances and legal rulings"). At the other end of the spectrum lies the view that a court should avoid such wholesale incorporation because it "would impair the duality of remedies currently afforded aggrieved parties under principles of *res judicata* or separation of power." *Burton v. Sheheen*, No. 3:91-2983-1, slip op. 41 (D. S.C. May 1, 1992) (three-judge court).

There is no need for the Special Master to resolve this issue in the instant case. First, all parties and amici agree that section 2 must, at a minimum, *be considered* in crafting the redistricting plan. Tr., vol. II at 22. Second, the Three-Judge Court has instructed the Special Master to "recommend to the court a congressional redistricting . . . plan for Florida which comports with . . . the requirements of the Voting Rights Act, 42 U.S.C. § 1973 (1982) *et seq.*" Three-Judge Court's April 6 "Order Appointing Special Master," at 3, *De Grandy*. Furthermore, all parties agree that the Special Master should "respect minority concentrations," Tr., vol. II at 23-24, and all of their proposed plans include at least one African-American majority VAP district and two Hispanic supermajority VAP districts. *See* Attachment C; Indep. Exp. Ex. 3; Senate Exs. 4-14. Therefore, the Special Master's

task is to identify the best plan among those submitted, or to craft his own.

This middle-of-the-road approach comports with the instruction of the Supreme Court that "it is imperative for the District Court, in drawing up a new plan, to make every effort not only to comply with the established constitutional standards, but also to allay suspicion and avoid the creation of concerns that might lead to new constitutional challenges." *Connor v. Finch*, 431 U.S. 407, 425 (1977).

Yet, a key decision still must be made. The various plans submitted to the Special Master by the parties and amici curiae take two different approaches to the creation of African-American districts. First, four of the proposed plans create two districts with an African-American VAP majority. Second, three of the plans take a different tack, by creating only one district with an African-American majority of the VAP, but also creating two or three other districts with a respectable, *i.e.*, more than 44 percent, African-American VAP. *See* Attachment C; Indep. Exp. Ex. 3. The proponents of these latter "influence" districts argue that it is more desirable for African Americans to have some say, *i.e.* influence, in several districts, rather than to constitute a majority in only two districts.[10]

I recommend that the Special Master and the Court choose the first approach. I believe it is appropriate in

[10] At first blush, *Wilson v. Eu*, 823 P.2d at 545, might appear to support this position. In *Wilson*, the court recognized the legitimacy "of forming minority *influence* districts to maximize the voting potential of geographically compact minority groups of appreciable size . . . even though the individual minority groups involved . . . were of insufficient size to constitute a majority in their voting districts." *Id.* (emphasis in original) (citations omitted). The special masters in *Wilson*, however, used influence districts to maximize minority voting strength, rather than as a substitute for drawing a possible minority-*majority* VAP district.

this case to include two African-American (or Hispanic) VAP majority districts because the NAACP, the Margolis, and other plans clearly demonstrate this can be done on a reasonable basis.

To fracture the African-American community into influence districts would merely continue the past dilution of minority voting strength. *Compare Jordan v. Winter*, 461 U.S. 921 (1983) (vacating three-judge court's influence district remedy,[11] and remanding for reconsideration in light of amendments to § 2); *with Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984) (affirming[12] use of majority African-American district as remedy). *See also United States v. Dallas County Comm'n*, 850 F.2d 1433, 1439-42 (11th Cir. 1988) (vacating district court's remedy, which included one at-large influence district, and adopting instead a plan with five single-member districts, including two African-American districts, two white districts, and one African-American "swing" district).

As Congress emphasized, section 2 was intended to remedy "completely" minority vote dilution by eliminating electoral schemes that prevent the election of minority-preferred candidates. Senate Report, *supra*, at 31. Creating "influence districts" simply does not further "Congress' intent of completely remed[ying] the prior dilution of minority voting strength." *See id.* Hence, section 2 is violated by an electoral "standard, practice or procedure," which impairs the ability of protected minority groups "to participate in the political process *and to elect representatives* of their choice." 42 U.S.C. 1973(b) (1982) (emphasis added). To ignore this language, by accepting a plan in which minority groups can only "influence" elections, merely perpetuates, albeit in a some-

[11] *See Jordan v. Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982) (three-judge court).

[12] *See Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss. 1984) (three-judge court).

what different manner, the submergence of Florida's African Americans in districts dominated by block-voting whites. Unless the level of African-American influence is quite high, i.e., nearly a majority, a white population can bloc vote against, and thereby defeat, minority-preferred candidates. *See generally Reynolds v. Sims*, 377 U.S. 533 (1964) (election of candidates is the true measure of electoral strength); *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11, 48 n.15 (1986). *See also* Tr., vol. V at 60-61 (Professor Richard Scher).

c. Section 5 Considerations

As this will be a court-made plan, preclearance is not required. *McDaniel v. Sanchez*, 452 U.S. 130, 138 (1981). However, the court should consider issues of possible retrogression in Florida's five "covered" counties. *See id.* at 148-49; Senate Report, *supra*, at 18-19. *See generally* House Ex. 4, Tab 4 (providing some statistics for comparing the proposed plans in this respect); Attachment E (figures for Independent Expert's Plan). See Part IV, below.

B. *Secondary Criteria*

In addition to the two critical statutory and constitutional requirements, several other factors, such as contiguity, compactness, respect for traditional boundaries (*e.g.*, county lines), maintaining communities of interest, and encouraging party competitiveness, may be considered.

1. Contiguity

Contiguity is not a serious concern in this case. *In re Apportionment Law*, 414 So. 2d 1040 (Fla. 1982), defined contiguity in the context of the *state* legislative reapportionment. The Florida Supreme Court found "that a '[d]istrict lacks contiguity only when a part is isolated from the rest by the territory of another district.'" *Id.* at 1051 (quoting *Mader v. Crowell*, 498 F.

Supp. 226, 229 (M.D. Tenn. 1980)). Very recently, the Florida Supreme Court went still further, explaining (again in the context of the state legislative boundaries) that contiguity

> does not impose a requirement of a paved, dry road connecting all parts of a district. Contiguity does not require convenience and ease of travel, or travel by terrestrial rather than marine forms of transportation.
>
> * * * *
>
> We hold, therefore that the presence in a district of a body of water without a connecting bridge, even if it necessitates land travel outside the district in order to reach other parts of the district, does not violate this Court's standard for determining contiguity under the Florida Constitution.

In re Constitutionality of Joint Resolution 2G, slip op. at 5, 6.

Furthermore, contiguity, even under these generous interpretations, is not required for Florida's congressional districts. In *Lund v. Mathas*, 145 So. 2d 871 (Fla. 1962), the court interpreted the provision of the state constitution requiring contiguous districts to apply "solely to the apportionment of the State Senate and State House of Representatives" and not to the redistricting of congressional seats. *Id.* at 873. Although the Florida Constitution has been revised and amended several times since *Lund*, the provision in the current version dealing with apportionment still applies solely to plans for the *state* legislature. *See* Fla. Const. Art. III, § 16 (emphasis added). Thus, there still is no Florida constitutional provision dealing with congressional reapportionment or redistricting.[13]

[13] Furthermore, the current relevant state statute is curative. It provides that any portion of the State which is not included within a congressional district, but is entirely surrounded by a district, is deemed to be included within that district. If the unlisted area is contiguous to two districts, it will be included in the least populated district. Fla. Stat. Ann. § 8.011 (1989).

Nor is there any federal requirement that congressional districts be contiguous. Article I, section 2, of the Constitution sets out no such standard. Courts construing that provision have held that contiguity is "appropriate," but they have *not* found it to be constitutionally mandated. *See Dunnell v. Austin*, 344 F. Supp. 210, 215 (E.D. Mich. 1972); *David v. Cahill*, 342 F. Supp. 463, 469 (D. N.J. 1972).[14]

Even though contiguity is not required, I nonetheless, recommend that any plan proposed by the Special Master and adopted by the Three-Judge Court include a more detailed provision on contiguity in order to cure any technical flaws that may have arisen in the heat of this redistricting process. *See* Attachment D (revised version of current statutory language, as suggested by legislative Staff).

2. Compactness

Geographic compactness is considered a functional, population-oriented determination. *Dillard v. Baldwin County Bd. of Educ.*, 686 F.Supp. 1459 (M.D. Ala. 1988). Thus, "the number and kinds of factors a court should consider may vary with each case, depending upon the local geographical, political, and socio-economic characteristics of the jurisdiction being sued." *Id.* at 1466. However, when districts are drawn with the express pur-

[14] Moreover, during the preclearance process, the Attorney General must examine whether a proposed change is unconstitutional. *See* 28 C.F.R. § 51.55(a) (1990). In *Dillard v. Town of Louisville*, 730 F. Supp. 1546 (M.D. Ala. 1980), the court noted that the Department of Justice had not imposed any objection to the Town's inclusion of a noncontiguous district to remedy minority vote dilution. *Id.* at 1546, 1547. Thus, even if the Special Master's Plan were subject to preclearance, which it is not, the inclusion of a noncontiguous district probably would not be fatal.

pose of protecting minority voting strength (a primary criterion), criticisms of district configurations based upon this (secondary) aesthetic criterion are misplaced. *Id.* The *Dillard* court found that compactness does not require "a proposed district [to] meet, or attempt to achieve, some aesthetic absolute, such as symmetry or attractiveness." *Id.* at 1465. Instead, the focus of any geographic compactness analysis should be upon the size and relative concentration of the minority population, rather than upon the size or shape of the district. In fact, "racial and ethnic considerations are appropriate in drawing districts to advance the goals of the Voting Rights Act." *Hastert,* 777 F. Supp. at 650-51. Mr. William Jones, the Common Cause expert in the instant case, viewed compactness as a very valuable goal in drawing districts, but recognized that deviations from that goal may be necessary in order to create minority districts. Tr., vol. II at 335. *See also* Tr., vol. IX at 153 (Dr. Hofeller) ("[C]ompactness is to fall in the face of the need to build minority districts."); Tr., vol. I at 86 (Dr. Paulson); *Burton v. Sheheen,* No. 3:91-2983-1, slip op. 80-81.

3. Respect for Traditional Boundaries

There is no requirement that traditional boundaries be followed in drawing congressional redistricting plans for Florida. *See In Re Apportionment Law, Senate Joint Res. No. 1305,* 263 So. 2d 77, 801 (1972). As with compactness, then, this may be a desirable approach but should not be used in a manner which undercuts one of the two primary criteria.

4. Communities of Interest

Communities of interest may be relevant to the determination of compactness. The California Supreme Court accepted that "the functional aspect of geographical compactness takes into account the presence or absence of a

sense of community made possible by open lines of access and communications." *Wilson,* 823 P.2d at 549. Members of a minority group who live in separate enclaves may still be included in a single district where it can be shown that they constitute a single community having similar interests. *See, e.g., Hastert,* 777 F. Supp. at 649 (Hispanic population split into two enclaves by "exogenous and institutional barriers" treated as single community for purposes of compactness).

5. Party Competitiveness.

Though Florida currently has more registered Democrats than Republicans, its elections reflect that it has developed into a strong two-party state. There was testimony regarding the importance of maintaining party competitiveness in Florida's congressional districts. *See, e.g.,* Tr., vol. III at 20-21; (Arrington testimony); Tr., vol. V at 121-22 (King testimony); Tr. vol. VII at 32-33 (Webster testimony). These three experts employed varying, but similar, methods to estimate the degree of party competitiveness for particular plans.

I conclude that the most direct measure of competitiveness for any of the submitted plans, and for the one I propose, is the difference in the percentage of the vote each candidate would have received if a highly competitive, partisan election were conducted in that plan's districts. Accordingly, I requested that the Senate Staff generate a table indicating what the outcome under each plan would have been in the 1988 senatorial race between McKay and Mack. The analysis groups the *actual votes* cast in that election into the districts for each of the plans submitted to the court and in the districts for my proposed plan. *See* Attachment F. *See also* Senate Exs. 23, 24. That Table reflects the difference in the percentage of votes each candidate received in the area now encompassed in a proposed district. In the table, a *lower* number means a closer vote and, therefore, a *higher* degree of competitiveness.

Of all the districts in all the plans, the range is from 0.1 percent (i.e., a rounded 50.0%/50.0% split) in district 13 for Plan 296 (the Reddick plan), to 47.2 percent (i.e., a 73.6%/26.4% split) in district 22 for Plan 302 (the James plan). In other words, the Reddick plan includes the most competitive district, while the James plan includes the least competitive district.

When the competitiveness of all districts for each plan is averaged, the mean difference for each plan results. These differences range from a competitive 14.8 percent in Plan 279 (the Gordon plan) to a less competitive 17.1 percent in both Plan 287 (the Margolis plan) and Plan 293 (the NAACP plan). *See* Attachment F.

III. REVIEW OF THE PLANS IN LIGHT OF THESE CRITERIA

Each of the plans listed in Part I is evaluated here in terms of the criteria discussed in Part II.

A. *NAACP Plan*

The NAACP plan was submitted by Plaintiff Florida State Conference of NAACP Branches. The plan contains two districts in which there are African-American VAP majorities. District 3, in northeast Florida, has a 54.8 percent African-American population, with corresponding 50.5 percent VAP, and 50.1 percent registered voter majorities. District 20 in Dade County has a 61.0 percent African-American population, with corresponding 56.4 percent VAP, and a 60.8 percent registered voter majorities. *See* Attachment C.

The NAACP plan also contains an African-American influence district. District 18 is a long, narrow district that runs along Interstate 95 from St. Lucie County to Broward County on Florida's east coast. District 18 has an African-American population of 50.8 percent, with a 44.9 percent VAP and a 39.6 percent registered voter plurality. *Id.*

This approach—two majority African-American districts and one influence district—is to be contrasted with the approach of the De Grandy and Lawyers' Committee plans. The latter plans create one African-American VAP majority district and three influence districts.

The NAACP plan also creates two Hispanic supermajority districts in Dade County, District 22 has an Hispanic population of 65.8 percent, with a 66.8 percent VAP.[15] District 23 has an Hispanic population of 66.8 percent, with a 66.9 percent VAP.

I believe the basic approach taken by the NAACP plan is sound. The plan creates two districts with majority African-American VAP, and two districts with supermajority Hispanic VAPs. However, the plan has an important technical flaw—it has a 0.02 percent deviation from absolute population equality. *See* House Ex. 4, Tab. 1. While this deviation is quite small, other plans taking the same basic approach have even smaller deviations. *See id.* Finally, the NAACP plan is one of the least politically competitive plans. *See* Attachment F.

Therefore, while the NAACP plan's basic approach is admirable, I cannot recommend adoption of this plan *in toto*. The NAACP plan as presently structured would be unacceptable as a court-made plan in this case, because of the 0.02 percent deviation from absolute population equality.

I stress that this rejection of a good plan on the basis of a 0.02 percent deviation may not be necessary in future cases. *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992), discussed whether exact population equality is required. The California Supreme Court found that precise population equality, while desirable, was not mandatory for a constitutional redistricting plan. First, some deviations will be allowed

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[15] No data was provided for this or any other plan regarding the registration rates of Hispanics in the State, because of the unreliability of such statistics.

if one is justified by "legitimate, consistently applied state and federal policies." *Id.* at 570. Second, technological advances now allow those parties who have sufficient resources to use very precise census data in drawing their plans (i.e., census blocks instead of larger census tracts), but the cost of such state-of-the-art equipment "would be prohibitive for any private person or group having resources short of those available to the legislature." *Id.* at 571.

The *Wilson* court found this second reason to be compelling in light of the interest under both California law and the Voting Rights Act in encouraging "[w]idespread participation in the redistricting process." *Id.* In the instant case, however, the sophisticated technology of the House and Senate computers has been made available to the parties and amici in preparing their plans. Also, several plans demonstrate that the bare minimum deviation for population equality can be attained while still protecting minority voting strength.

B. *De Grandy Plan*

The sponsor of Plan 212 is Miguel De Grandy, an Hispanic member of the Florida House of Representatives, and a named plaintiff in this case. Tr., vol. VI at 16; January 14, 1992 "Complaint for Declaratory and Injunctive Relief" at 3, *De Grandy*. The plan was also supported by Representatives Mario Diaz-Balart and Daniel Webster,[16] who testified during the Hearings, along with representatives of various other community organizations. Tr., vol. IV at 40.

The De Grandy plan establishes a single African-American influence districts (districts 3, 7, and 23), and two Hispanic supermajority VAP districts (districts 18

[16] Representative Daniel Webster is different from Amicus Daniel Webster, who proposed and presented his own plan. See Part III.K., below.

and 21). The African-American total population majority of 58.4 percent, an African-American VAP of 54.0 percent, and an African-American registration majority of 59.3 percent. The three African-American influence districts all have an African-American VAP of more than 44 percent; the largest VAP is 47.5 percent. District 3 has a total African-American population of 51.3 percent, a VAP of 47.5 percent, and a registration rate of 48.4 percent. The figures for districts 7 and 23 are, respectively: 51.8 percent total African-American population, 46.6 percent VAP, and 47.8 percent registration; and 50.9 percent total African-American population, 44.9 percent VAP, and 39.9 percent registration. *See* Attachment C.

The two Hispanic supermajority districts both have Hispanic VAPs which exceed 65 percent. District 18 has a total population that is 66.7 percent Hispanic, with an Hispanic VAP of 67.5 percent. District 21 is 69.6 percent Hispanic, with an Hispanic VAP of 70.6 percent. *See* Attachment C.

According to the De Grandy witnesses, the plan's minority districts were drawn first, taking into account existing concentrations of minorities. They testified that the African-American minority-majority district and the influence districts were fashioned around state legislative seats that have elected minority candidates. State House seats were used as building blocks for all districts, including the minority districts. In drawing the white Anglo districts, the plan sought to maintain communities of interest to the greatest extent possible.

The De Grandy plan builders viewed the state as having three regions: southern, central and northern. In the north, the plan creates an African-American influence district, that connects rural African Americans along its northern border and in the northeast corner of the state. A central Florida influence district sprawls from Orlando in the north, down into Osceola and Highlands County in the south, and then to Tampa and St. Petersburg in the west.

Moving south, the De Grandy plan creates two African-American districts: one influence and one majority. The influence district (district 23), runs through parts of St. Lucie, Martin, and Palm Beach counties, with a tail reaching south parallel to the coast, running through Broward County. The majority district (district 17) includes the area immediately to the north of Miami, with a tail that runs down through Miami and reaches south. This extension of district 17 is enveloped by district 18, one of the Hispanic majority districts.

The two Hispanic supermajority districts, as well as the African-American majority district, are wholly contained within Dade County. District 18 extends from the coast south of Miami down around the tip of the African-American majority district (district 17) and back up into West Miami. The other Hispanic district (district 21) encompasses the area to the west of Miami, including Hialeah and Kendall Lakes.

The paramount advantage of the De Grandy plan is its excellent treatment of Hispanics in Dade County. The plan recognizes the divisions that exist within south Florida's Hispanic community and preserves relatively homogeneous Cuban-African neighborhoods.

The De Grandy plan, however, has various disadvantages. First, the plan provides for only one African-American majority VAP district, although it does have three influence districts. Second, in the central Florida area, the Tampa and Orlando communities linked by the sprawling district are likely to have competing interests, particularly in the context of attracting new industries. Thus, the proposed central Florida influence district has been challenged on the ground that it combines minority populations which do not constitute communities of interest. *See* Tr., vol. III at 27 (testimony of Dr. McManus); Tr., vol. I at 113-14 (testimony of Mr. Russell). In addition, the African-American VAP in the influence district could be increased.

C. *Lawyer's Committee Plan*

The Lawyers' Committee plan consists of two identical plans, known as the Humphrey plan and the first Reaves/Brown/Hargrett plan. Sponsors of the Humphrey plan (Plan 202) are known in this litigation as the "Humphrey Intervenors." They are African-American citizens, registered to vote in the State of Florida, who assert that, because of malapportionment resulting from population changes, they are under-represented in the United States Congress. "Complaint for Injunctive and Other Equitable Relief" at 3-4, *De Grandy*.

The redistricting plan proposed by the Humphrey Intervenors was submitted by members of the legislative Black Caucus during the legislative session. As noted, the Humphrey plan is identical to Plan 610, and it is supported by the sponsors of that plan—Representatives Reaves, Brown and Hargrett.

This plan's geographic approach is to build an African-American majority district in the south, with influence districts in the northern, central and southern areas of the state. Both of the Hispanic supermajority districts are in the southern portion of the state. The creators of the Humphrey plan sought to craft four districts which had an African-American majority *in populaiton* by using the lines for existing State House seats already held by African-American legislators. May 11, 1992 "Notice of Filing Post Trial Memorandum of Plaintiff-Intervenors Gwen Humphrey et al." at 6. They argue that any unusually shaped districts were drawn "for the purpose of protecting black voting strength." *Id.* at 9.

The De Grandy and Lawyers' Committee plans are identical in nearly all aspects relevant to this Report. As George Meier, Staff Director of the Committee on Reapportionment for the Florida House of Representatives, testified, the only difference between the two plans is that the De Grandy plan moves a white Republican incumbent

into an open seat in district 16. Tr., VI at 163-64. House Ex. 1 (dealing the specific blocks involved). He testified that the only other distinction between the two plans were minor geographic changes involving an insignificant number of persons. Tr., vol. VI at 162-64.

As a result, the population, VAP, and registration data for the African-American majority district (17), African-American influence districts (3, 7, 23), and the Hispanic supermajorities (18 and 21) in the Lawyers' Committee plan are identical to those listed above in the description of the De Grandy plan. See Part III.B., above. Also, both plans have a mean difference of 16.6 percent on the competitiveness scale. *See* Attachment F.

The slight differences in the De Grandy plan do, however, produce a minimal difference in population deviation. The De Grandy plan has a slightly higher deviation (0.00071%) than does the Lawyers' Committee plan (0.00018%). *See* House Ex. 4, Tab 1.

The Lawyers' Committee plan is disadvantageous in that it provides for only one African-American VAP majority district, while other plans (Ireland, Margolis, NAACP and James) have shown that two or more are possible.

D. *Common Cause Plan*

The Common Cause plan was sponsored by that national public advocacy group, which appears as amicus curiae in this case. The plan contains one district, located predominantly in Dade County, with an African-American supermajority. District 22 has an African-American total population of 65.3 percent, with 60.4 percent VAP, and 63.1 percent registered voter majorities. The plan also contains one African-American influence district, which runs along the Georgia border in extreme north Florida. District 2 has an African-American population of 39.6 percent, with 36.4 percent VAP, and 37.3 percent registered voters. *See* Attachment C.

The Common Cause plan also contains two districts, both predominantly in Dade County, with Hispanic supermajorities. District 20 has an Hispanic population of 64.2 percent, with 65.2 percent VAP. District 21 has an Hispanic population of 68.7 percent, with 69.9 percent VAP. *See* Attachment C.

The Common Cause plan creates majority districts for African Americans and Hispanics only in southern Florida. Common Cause drew these three districts, plus the African-American influence district, first. Then, districts were drawn throughout the remainder of the State, guided by Common Cause's principle of keeping counties together, except when a split had to be made to comply with the one-person, one-vote requirement.

The Common Cause plan achieves the minimum possible deviation possible—one person. *See* House Ex. 4, Tab 1. However, Common Cause's fairly strict adherence to county boundaries has prevented it from creating a second district with an African-American VAP majority. Several other plans were able to create this second African-American majority district, while still achieving the minimum deviation. Common Cause's demographer, Mr. Jones, and its expert, Professor Arrington, admitted it was not the best plan and recognized that its principal shortcoming was failure to create more minority districts. Tr., vol. II at 298 (Jones); Tr., vol. III at 14-15 (Arrington).

Therefore, I do not believe the Common Cause plan should be adopted as a whole. The treatment given to central Florida by Common Cause does, however, appear quite workable.

E. *Wetherell Plan*

The Wetherell plan was submitted by T.K. Wetherell, Speaker of the Florida House of Representatives, and Peter R. Wallace, Chairman of the Reapportionment

Committee. Neither the Special Master nor the Three-Judge Court is required to give this plan any special deference beyond that accorded to other plans. As it was passed by only one house of Florida's bicameral legislative, this is not a "legislative plan" within the meaning of *McDaniel v. Sanchez*, 454 U.S. 130 (1981). *See Upham v. Seamon*, 456 U.S. 37, 40-41 (1982); *White v. Weiser*, 412 U.S. 783, 794-95 (1973); *Cook v. Luckett*, 735 F.2d 912, 917 (5th Cir. 1984).

Article III, § 7, of the Florida Constitution requires that a bill be passed by majority vote in each house of the State Legislature. Having passed both houses, the bill must be presented to the Governor of Florida for his approval, or inaction, before it becomes law. *See* Fla. Const. art. III, § 7. *Cf. Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1982), and *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. ——, 111 S. Ct. 2298, 115 L. Ed. 2d 236 (1991) (bicameralism under the United States Constitution).

Because the Florida Constitution mandates bicameral action by the Legislature and subsequent presentment to the Governor as prerequisites, any judicial deference to the House plan would necessarily usurp the proper law-making roles of the State's Senate and Executive Branch. *See generally Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982) (Because congressional redistricting is a lawmaking function subject to the state's constitutional procedures, plan passed by both state houses but vetoed by governor was only " 'proffered current policy' rather than clear expressions of state policy.")

In terms of minority representation, the Wetherell plan has one African-American VAP majority district. In that district (district 20), 60.2 percent of the total population, 55.3 percent of the VAP, and 60.4 percent of the registered voters are African Americans. *See* Attachment C. The Wetherell plan has two African-American influence

districts. In the first (district 15), 50 percent of the total population, 44.3 percent of the VAP, and 39.8 percent of registered voters are African Americans. District 3 appears to be a very weak influence district, in which American Americans are only 36.9 percent of the district's total population, 33.3 percent of its VAP, and 34.6 percent of its registered voters.

The Wetherell plan has two Hispanic supermajority districts—district 17, in which Hispanics are 65.1 percent of the VAP, and district 18, in which Hispanics are 64.8 percent of the VAP. *See* Attachment C.

The House opted for policy choices rather than strictly legal considerations to guide their drafting of the Wetherell plan. Compactness, coherent communities of shared interests, and the ways in which counties and cities were divided had significance. The mean difference for the MacKay/Mack election would have been 15.9 percent, *see* Exhibit F, though some other scales ranked it as less competitive.

F. *Margolis Plan*

The Margolis plan was submitted by Defendant Gwen Margolis, President of the Florida Senate. The plan proposes two African-American majority districts. District 3, in north Florida, has a 54.5 percent African-American total population, a 50.1 percent African-American VAP, and a 50.1 percent registered voter majority. District 3 contains the African-American population areas of Gainesville, Jacksonville, Dayton Beach, and Orlando. District 22, in south Florida, has a 67.2 percent African-American population, 62.2 percent African-American VAP, and 62.9 percent registered voter majority. *See* Attachment C. The district is located in Dade and Broward counties.

The Margolis plan also proposes the creation of two south Florida Hispanic majority districts. District 20 has

an Hispanic population of 64.0 percent and an Hispanic VAP of 64.3 percent. District 20 is located in part of Dade County and in the southern portion of Collier County. *See* Indep. Exp. Ex. 3. The second Hispanic majority district, district 21, has an Hispanic population of 65.0 percent and an Hispanic VAP of 66.4 percent. *See* Attachment C. District 21 is located in five counties —Dade, Broward, Collier, Hendry and Palm Beach.

Proponents of the Margolis plan claim that it balances the need to provide minority groups access to the political process with the maintenance of political parity and the formation of compact political districts. *See* Defendants' Margolis and Gordon, Apr. 24, 1992 "Memorandum of Law in Support of SJR 2G and Plan 287." To a limited degree, the plan has achieved this goal. Two African-American and two Hispanic VAP majority districts have been created. District 3, in north Florida, is quite well-designed, though its African-American VAP percentage could have been increased somewhat with little effort.

The weakness of the Margolis plan, however, involves its method of forming the two south Florida Hispanic districts. Both districts are created by combining Dade County Hispanic neighborhoods with areas in predominantly non-Hispanic, adjacent counties. The division of Dade's Hispanic neighborhoods among five congressional districts seriously damages the community of interest of these neighborhoods. Also, the inclusion of areas of high Anglo growth, such as Naples in district 20, creates the possibility of ethnically divided political races. *See* Tr., vol. III at 283. Furthermore, transferring several hundred thousand Dade Hispanics into non-Hispanic districts greatly reduces the likelihood that these voters will be able to elect candidates of their choice.

G. *Gordon Plan*

The Gordon plan was submitted by Defendant Jack Gordon, Chairman of the Florida Senate's Committee on

Reapportionment. The Gordon plan and the Margolis plan are substantially similar, except the Gordon plan does not contain a north Florida African-American majority or influence district The Gordon plan proposes one African-American majority district, district 22, in south Florida. District 22 has a 67.4 percent total African-American population, a 62.4 percent African-American VAP, and a 63.2 percent registered voter majority. *See* Attachment C.

The plan also proposes the formation of two Hispanic majority districts in south Florida that are nearly identical to the Hispanic districts in the Margolis plan. District 20 has a 64 percent Hispanic population and a 64.3 percent Hispanic VAP. District 21 has a 65.3 percent Hispanic population and a 66.3 percent Hispanic VAP. *See* Attachment C. These districts have the same disadvantages as their Margolis counterparts. *See, e.g.*, Tr., vol. IX at 174-75 (Dr. Thomas Hofeller).

The Gordon plan has two major deficiencies. Like the Margolis plan, the Gordon plan decreases the access of Dade County Hispanics (especially Cubans) to the political process by "cracking" them into five congressional districts which extend beyond Dade County. The second deficiency is the failure of the Gordon plan to draw a second African-American majority district, as several *other plans have done*. *See* Tr., vol. III at 57.

H. *Reddick Plan*

The Reddick plan was submitted by Alzo Reddick, State Representative from Orlando. The plan creates one African-American majority district, district 22, in south Florida. District 22 has an African-American total population of 57.7 percent, an African-American VAP of 52.6 percent, and a 55.7 percent registered voter majority. *See* Attachment C. District 22 is located in Dade and southeast Broward counties. The Reddick plan also creates an

African-American influence district, district 2, in north Florida. In that district, 39.7 percent of the total population is African American, 36.3 percent of the VAP is African American, and 37.3 percent of the registered voters are African American. *See* Attachment C. The district is located primarily on the Georgia-Florida border, and it combines several rural counties with some African-American population areas of Duval County.

The Reddick plan also contains two Hispanic majority districts, 20 and 21, that are located primarily in Duval County. District 20 has an Hispanic population of 64.6 percent and an Hispanic VAP of 65.7 percent. District 21 has an Hispanic population of 68.5 percent and an Hispanic VAP of 69.5 percent. *See* Attachment C.

The Reddick plan is a derivative of the Common Cause plan, and like the Common Cause plan, it attempts to prevent the splitting of counties when drawing congressional districts. By emphasizing compactness and respect for county boundaries over the formation of minority districts, the Reddick plan creates compact, regularly shaped districts that often follow county boundaries. *See* Tr., vol. VIII at 130-33.

The weakness, however, is that the Reddick plan minimizes the ability of minority groups, particularly African Americans, to participate in the political process. The Reddick plan creates only one African-American majority district and one African-American influence district. Other than districts 2 and 22, the plan contains no district with an African-American VAP above 20 percent, and even the influence district has a small African American VAP (36.3 percent). *See* Attachment C. I believe the Reddick plan would not create the best opportunities for Florida's African Americans to elect candidates of their choice.

I. *Ireland Plan*

The Ireland plan was submitted by Intervenor Andy Ireland, Congressman from current district 10. The plan was prepared by Dr. Thomas B. Hofeller, Director of Redistricting for the National Republican Congressional Committee.

Under the Ireland plan, two African-American majority districts (districts 6 and 22) and one African-American influence district (district 2) are created. District 6 has an African-American total population of 56.1 percent, an African-American VAP of 50.8 percent, and a 52.1 percent registered voter majority. *See* Attachment C. District 6 is an extremely long, irregularly shaped district that extends from Palm Beach County in south Florida to Volusia County in central Florida and from St. Lucie County on the Atlantic Coast to Pinellas County on the Gulf Coast. It has some of the same disadvantages as the sprawling central Florida district contained in the De Grandy plan.

The second African-American majority district (district 22) is located in northeast Dade County and southeast Broward County. District 22 has an African-American population of 67.5 percent, an African-American VAP of 62.3 percent, and a registered voter majority of 62.6 percent. *See* Attachment C.

The African-American influence district (district 2) has a total African-American population of 50.5 percent, an African-American VAP of 46.7 percent, and an African-American registered voter percentage of 48.2. *See* Attachment C. District 2 is primarily located along the Florida-Georgia border, but it extends south into Marion and Volusia counties and east into the African-American population areas of Duval County. *See* Indep. Exp. Ex. 3.

Like other plans submitted to the Special Master, the Ireland plan creates two Hispanic majority districts that

are located in Dade County. District 20 has a total Hispanic population of 65.9 percent and an Hispanic VAP of 67.3 percent. District 21 has a total Hispanic population of 71.4 percent and an Hispanic VAP of 72.1 percent. *See* Attachment C.

Proponents of the Ireland plan, a derivative of the Common Cause plan, contend that it attempt to maximize the number of minority-majority and influence seats. Two African-American and two Hispanic majority and one African-American influence district are theoretically formed by the plan. It is questionable, however, whether these districts will be effective. District 6 is particularly troublesome. This long, irregularly-shaped district traverses parts of seventeen counties and involves three major media markets. These barriers may enhance the difficulties that at candidate with limited resources would face. Additionally, the district contains several areas in which the rate of growth in the white community is expected to be large. Whether the African-American community will be able to maintain the 50.1 percent VAP majojrity in district 6 through the next decade is questionable. In the MacKay/Mack Senate race, the mean difference for the Ireland plan would have been 16.5 percent. *See* Attachment F.

J. *James Plan*

Craig T. James, Congressman from the current Fourth District of Florida, sponsored this plan as amicus curiae. The James plan provides for two African-American majority districts, in districts 2 and 22, and no influence districts. District 2, in north Florida, has a total African-American population of 58.6 percent, with an African-American VAP of 54.8 percent. African Americans account for 55.6 percent of registered voters. *See* Attachment C. The second African-American majority district, district 22, has a total African-American population of 65.0 percent, and an African-American VAP of 59.5 percent and a 60.2 percent African-Americans registered voter majority. *See* Attachment C.

The James plan also creates two Hispanic supermajorities in districts 20 and 21, both in Dade County. Tr., Vol. IX at 200. District 20 has a total Hispanic population of 65.8 percent and an Hispanic VAP of 67.1 percent. The second Hispanic supermajority district, district 21, has a total Hispanic population of 70.6 percent and an Hispanic VAP of 71.4 percent. *See* Attachment C. The James plan has a total population deviation of 0.00036 percent. *See* House Ex. 4, Tab 1.

The basic theme behind the James plan was a desire to maintain the present district structure where possible and to leave incumbent districts intact. Tr., Vol. IX at 198-200. The James plan would have a mean difference in the MacKay/Mack race of 16.6 percent. *See* Attachment F. A favorable aspect of the James pian is that it creates two African-American majority districts. However, it creates no influence districts.

K. *Webster Plan*

The Webster plan was submitted by amicus curiae Daniel Webster, who presented the plan himself, with no expert testimony. *See* Tr., Vol. X at 109. The plan creates only one district with an African-American majority. District 20, located predominantly in Dade County, has an African-American population majority of 62.4 percent, with an African-American VAP of 57.6 percent, and a registered voter majority of 62.0 percent. The Webster plan does not create any other districts with an African-American VAP of 35 percent of more. *See* Attachment C.

The Webster plan creates two Hispanic supermajority districts. District 17, composed of portions of Dade, Collier, and Hendry Counties, has an Hispanic population of 64.6 percent, with a VAP of 65.0 percent. District 18,

located within Dade County, has an Hispanic population of 64.7 percent, with a VAP of 65.3 percent. *See* Attachment C.

The plan focuses on central and north Florida. Webster claims that there was insufficient computer time available to remap the entire state. April 17, 1992 "Notice of Filing Map and Population Statistics, and Memorandum of Daniel Webster 1," *De Grandy*. Webster argues that he chose not to create an African-American influence district in north or central Florida to avoid "packing" African Americans into a single district. *Id.* at 2.

The Webster plan should not be adopted by the Court. It has a deviation of .00124, *see* House Ex. 4, at Tab 1, and it does not comply with the mandates of the Voting Rights Act. The Webster plan merely perpetuates the traditional cracking of African-American voters, by keeping them submerged in heavily white districts.

IV. THE PROPOSED INDEPENDENT EXPERT PLAN (PLAN 308)

The plan I propose does not reinvent the wheel; rather, it is assembled from key portions of other plans—De Grandy, Common Cause, Margolis, and NAACP. This plan (designated at Plan 308 by the Senate computer) takes the NAACP and De Grandy approach to African-American districts, by including two African-American VAP majority districts, plus one influence (or plurality) African-American VAP district. It follows the De Grandy approach, with some modifications, in South Florida, thereby keeping Cuban-American communities together and creating two Hispanic supermajority districts, plus one African-American VAP majority district in Dade County. Some adaptations, however, were necessary to take account of transportation connections and development patterns in south Florida. My proposed plan follows the lead of the Margolis plan with respect to the African-

American majority district in north Florida, but it somewhat adapts that district based upon changes inspired by the NAACP plan. It generally employs the Common Cause approach to central Florida.

A. *Geographic Description with Emphasis upon Lineage and Derivation from Other Plans*

The proposed Indeepndent Expert Plan (Plan 308) basically divides the State of Florida into three parts—southeast (from Key West to Palm Beach County), central (from the Gulf Coast to Brevard County on the east coast), and north (above Orlando) Florida.

The southeastern portion of the plan (districts 17-23) is largely derived from the De Grandy plan but with important changes in the African-American influence district (district 23), which were inspired by the NAACP plan. Also, Monroe County was removed from De Grandy district 15 and transferred to Independent Expert district 20, so as to reflect development patterns along the east coast. Those two changes required certain detailed adjustments in order to ensure zero deviation among the resulting districts.

The central Florida portion of the Independent Expert Plan (districts 9-16) is derived from the Common Cause plan. The interface between the adapted De Grandy plan and the Common Cause plan, plus the zero deviation requirement, mandated certain boundary adjustments, especially for districts 8 and 16.

The north Florida portion of the Independent Expert Plan (districts 1-8) is derived from the Margolis plan. However, several adjustments were made to district 3 to increase the African-American VAP majority and registration levels. Again, these changes were largely inspired by the NAACP plan. These changes, plus interface adjustments (at points where the borrowed Margolis plan districts meet the borrowed Common Cause plan districts)

required minor adjustments to satisfy the zero deviation requirement.

Districts 17, 18 and 21 in the Independent Expert Plan are virtually identical to the same-numbered districts in the DeGrandy plan; districts 10, 11, 13 and 14 in the Independent Expert Plan are virtually identical to the same-numbered districts in the Common Cause plan; and districts 1, 2, 4 and 7 in the Independent Expert Plan are virtually identical to the same-numbered districts in the Margolis plan. Furthermore, district 22 is similar to district 22 in the De Grandy plan and districts 5 and 6 are similar to the same-numbered districts in the Margolis plan. *Compare* Attachment C (statistics for other plans) with Attachment G (statistics for Independent Expert Plan). *See also* Attachment A (map of Independent Expert Plan); Indep. Exp. Ex. 1 (color maps and statistics). By following the district lines of other plans wherever possible, I have attempted to make it easier for the parties and amici to analyze the implications of my proposed plan based upon the evidence already in the Record.

B. *Demographic Analyses*

As noted above, the Independent Expert Plan creates two supermajority Hispanic districts (districts 18 and 21). District 18 has an Hispanic VAP of 67.5 percent, and district 21 has an Hispanic VAP of 70.6 percent. *See* Attachment G; Independent Exp. Ex. 1. Based upon testimony regarding the De Grandy and Lawyers' Committee plans, I believe these are reasonable numbers for an effective Hispanic district.

The Independent Expert Plan also creates two African-American majority VAP districts—one in south Florida (district 17) and one in north Florida (district 3). *See* Attachments A and G; Indep. Exp. Ex. 1. District 17, in Dade County, has a total African-American population of 58.4 percent, VAP of 54.0 percent, and registration of

59.3 percent. District 3 has an African-American total population of 55.0 percent, VAP of 50.6, and registration of 50.6. *See* Attachment C. It is, therefore, an improvement over the comparable districts in the Margolis plan. In addition, the Independent Expert Plan creates one African-American influence district (district 23) with a substantial VAP of 45.7 percent. It, therefore, is an improvement over the influence district proposed by the De Grandy plan. *See* Attachments C and G.

C. *Retrogression Analysis*

As noted above, any plan adopted by the Three-Judge Court will be a court-made plan, and, therefore, will not have to be submitted for preclearance. See Part II.A(2)(b), above. Yet, retrogression should be considered. Only five Florida counties—Collier Hardee, Hendry, Hillsborough, and Monroe—are "covered jurisdictions" within the meaning of the Voting Rights Act. Some have argued that a preclerance examination should involve only those five counties. *See* April 24, 1992 "Brief of Intervenor Florida AFL-CIO," at 6 n.2, *De Grandy*. Others have maintained that the entire redistricting plan must be examined for compliance with section 5's standards. *See* April 23, 1992 "Memorandum of Law in Support of Redistricting of Plans Submitted by Plaintiffs-Intervenors Gwen Humphrey *et al.*," at 10-11, *De Grandy*.

I decline to enter this debate because, from a practical viewpoint, some level of review of the entire plan is necessary in the instant case. Florida's population growth has resulted in four additional congressional seats. This plan (and the others) are *statewide* congressional redistricting plans, whose districts must all have the same population. See Part II.A(1), above. Therefore, no one district can be examined or changed in isolation. Furthermore, none of the districts in the plan I propose (or in any other plan submitted to the Court, for that matter) is identical, that is, coterminous, with any district existing under the 1982

congressional plan. *See* Attachments A, B, and E. Thus, there can be no simple numerical test for retrogression.

My proposed plan (like many of the plans submitted to the Special Master) increases both Hispanic and African-American political representation, when the Florida congressional delegation is considered as a whole. That overall increase has been possible only by a remapping of the districts. In the process of remapping, some minorities in Florida's covered jurisdictions may constitute marginally less of a district (or districts) than before and some of those minorities may constitute *more* of a district (or districts) than before. *See In re Constitutionality of Senate Joint Resolution 2G*, slip op. 17. But, overall, the plan can substantially increase the level of political participation and electoral representation for the members of minority groups in Florida. Therefore, I believe the plan does not produce retrogression.

D. *Party Competitiveness Analysis*

Employing the measure described in Part II.B(5), above, the Independent Expert Plan contains districts ranging in competitiveness from 0.9 percent in district 12 to 43.1 percent in district 17. The overall competitiveness of the plan, i.e., is the mean difference, is 15.9 percent. This compares favorably to the mean of 16.1 percent and median of 16.5 percent for the other plans. *See* Attachment F.

Additionally, it is somewhat more competitive than the mean competitiveness (16.3 percent) of its three base plans (Margolis, De Grandy and Common Cause). More specifically, in the seven districts (1 through 7) derived from the Margolis plan, it is slightly more competitive (17.9 percent) than the Margolis plan (18.0 percent). In the seven districts (9 through 15) adapted from the Common Cause plan, the Independent Expert Plan is also slightly more competitive (9.8 percent) than the Common

Cause plan (9.9 percent). In the seven districts (17 through 23) derived from the De Grandy plan, the Independent Expert Plan is more competitive (20.5 percent) than the De Grandy plan (20.7 percent). Finally, in the two districts 8 and 16) with mixed parentage, the Independent Expert Plan is competitive (17.2 percent and 8.9 percent, respectively).

More important criteria than competitiveness were utilized in designing the districts in this proposed plan. *See* Part II.A., above. After the primary criteria have been addressed, however, competitiveness is a consideration in measuring the voters' ability to elect *and* to hold accountable the representative of their choice. I believe the Independent Expert Plan provides improved competitiveness within the strict parameters imposed by meeting the primary redistricting criteria.

V. CONCLUSION

For the foregoing reasons, I urge the Special Master and the Three-Judge Court to adopt this plan for Florida's congressional redistricting.

Respectfully submitted this 14th day of May, 1992.

/s/ M. David Gelfand
M. DAVID GELFAND
Independent Expert Witness

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSE DIVISION

(Title Omitted in Printing)

DECLARATION OF ALLAN J. LICHTMAN

Pursuant to 28 U.S.C. 1746, I, Alan J. Lichtman, declare that:

1. I have been retained by the United States in connection with the above-captioned case.

2. A true copy of my curriculum vitate is attached hereto.

3. I have been informed by counsel for the United States that I may be called upon to testify as an expert witness on behalf of the United States in this case. My anticipated testimony may be in one or all of the following areas:

A. The opportunities afforded minority voters to participate effectively in the political process and to elect candidates of their choice under the legislative plans enacted by the State of Florida, as well as the election opportunities afforded minority voters under alternative plans offered by any other party.

B. The validity of any methodology used by expert witnesses in this case to assess the viability of minority districts in the State of Florida.

C. Population growth and the viability of election districts created or proposed in the Dade County area, particularly the impact of such districts on the Hispanic population.

D. Standards and principles of racial vote dilution, and whether voting patterns in the State of Florida are characterized by racial or ethnic polarization.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Allan J. Lichtman
ALLAN J. LICHTMAN

Executed on this 22 day of June, 1992.

Curriculum Vitae

Allan J. Lichtman
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EDUCATION

BA, Brandeis University, Phi Beta Kappa, Magna Cum Laude, 1967

PhD, Harvard University, Graduate Prize Fellow, 1973

PROFESSIONAL EXPERIENCE

Teaching Fellow, American History, Harvard University, 1969-73

Instructor, Brandeis University, 1970, quantitative history.

Assistant Professor of History, The American University, 1973-1977

Associate Professor of History, The American University, 1977-78

Professor of History, The American University, 1978-

Associate Dean for Faculty and Curricular Development, College of Arts & Sciences, The American University 1985-1987

HONORS AND AWARDS

Teacher of the Year, College of Arts and Sciences, 1975-76

Scholar of the Year, College of Arts and Sciences, 1978-79

Scholar of the Year, The American University, 1982-83

College of Arts & Sciences Nominee, American University Scholar/Teacher of the Year 1984-85, 1989-1990

Sherman Fairchild Distinguished Visiting Scholar, California Institute of Technology, 1980-81

American University summer research grant, 1978 & 1982

Chamber of Commerce, Outstanding Young Men of America 1979-80

Graduate Student Council, The American University, Faculty Award, 1982

Top Speaker Award, National Convention of the International Platform Association, 1983, 1984, 1987

National Age Group Champion (30-34) 3000 meter steeplechase 1979

Eastern Region Age Group Champion (30-34) 1500 meter run 1979

Defeated twenty opponents on nationally syndicated quiz show, TIC TAC DOUGH, 1981

SCHOLARSHIP

A. Books

PREJUDICE AND THE OLD POLITICS: THE PRESIDENTIAL ELECTION OF 1928 (Chapel Hill: University of North Carolina Press, 1979)

HISTORIANS AND THE LIVING PAST: THE THEORY AND PRACTICE OF HISTORICAL STUDY (Arlington Heights, Ill.: Harlan Davidson, Inc., 1978; with Valerie French)

ECOLOGICAL INFERENCE (with Laura Irwin Langbein, Sage Series in Quantiative Applications in the Social Sciences, 1978)

YOUR FAMILY HISTORY: HOW TO USE ORAL HISTORY, PERSONAL FAMILY ARCHIVES, AND

PUBLIC DOCUMENTS TO DISCOVER YOUR HERITAGE (New York: Random House, 1978)

KIN AND COMMUNITIES: FAMILIES IN AMERICA (edited, with Joan Challinor, Washington, D. C.: Smithsonian Press, 1979)

THE THIRTEEN KEYS TO THE PRESIDENCY (Lanham: Madison Books, 1990, with Ken DeCell)

POLITICS, POLICY, AND SOCIETY: A NEW HISTORY OF AMERICAN POLITICAL LIFE, in progress, contract signed with Indiana University Press.

B. Scholarly Articles

"The Federal Assault Against Voting Discrimination in the Deep South, 1957-1967," JOURNAL OF NEGRO HISTORY (Oct. 1969)

"Executive Enforcement of Voting Rights, 1957-60," in Terrence Goggin and John Seidel, eds., POLITICS AMERICAN STYLE (1971)

"Correlation, Regression, and the Ecological Fallacy: A Critique," JOURNAL OF INTERDISCIPLINARY HISTORY (Winter 1974)

"Critical Election Theory and the Reality of American Presidential Politics, 1916-1940," AMERICAN HISTORICAL REVIEW (April 1976)

"Across the Great Divide: Inferring Individual Behavior From Aggregate Data," POLITICAL METHODOLOGY (with Laura Irwin, Fall 1976)

"Regression vs. Homogeneous Units: A Specification Analysis," SOCIAL SCIENCE HISTORY (Winter 1978)

"Language Games, Social Science, and Public Policy: The Case of the Family," in Harold Wallach, ed., APPROACHES TO CHILD AND FAMILY POLICY

(Washington, D. C.: American Association for the Advancement of Science, 1981)

"Pattern Recognition Applied to Presidential Elections in the United States, 1860-1980: The Role of Integral Social, Economic, and Political Traits," PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCE (with V. I. Keilis-Borok, November 1981)

"The End of Realignment Theory? Toward a New Research Program for American Political History," HISTORICAL METHODS (Fall 1982)

"Kinship and Family in American History," in National Council for Social Studies Bulletin, UNITED STATES HISTORY IN THE 1980s (1982)

"Modeling the Past: The Specification of Functional Form," JOURNAL OF INTERDISCIPLINARY HISTORY (with Ivy Broder, Winter 1983)

"Political Realignment and 'Ethnocultural' Voting in Late Nineteenth Century America, JOURNAL OF SOCIAL HISTORY (March 1983)

"The 'New Political History': Some Statistical Questions Answered," SOCIAL SCIENCE HISTORY (with J. Morgan Kousser, August 1983)

"Personal Family History: A Bridge to the Past," PROLOGUE (Spring, 1984)

"Geography as Destiny," REVIEWS IN AMERICAN HISTORY (Sept. 1985)

"Civil Rights Law: High Court Decision on Voting Act Helps to Remove Minority Barriers," NATIONAL LAW JOURNAL (with Gerald Hebert, November 10, 1986).

"Tommy The Cork: The Secret World of Washington's First Modern Lobbyist," WASHINGTON MONTHLY (February, 1987).

"Discriminatory Election Systems and the Political Cohesion Doctrine," NATIONAL LAW JOURNAL (with Gerald Hebert, Oct. 5, 1987)

"Aggregate-Level Analysis of American Midterm Senatorial Election Results, 1974-1986," PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES (Dec. 1989, with Volodia Keilis-Borok)

"Black/White Voter Registration Disparities in Mississippi Legal and Methodological Issues in Challenging Bureau of Census Data," JOURNAL OF LAW AND POLITICS (Spring, 1991, with Samuel Issacharoff)

"Adjusting Census Data for Reapportionment: The Independent Role of the States," NATIONAL BLACK LAW JOURNAL (forthcoming, 1991, with Samuel Issacharoff)

"Passing the Test: Ecological Regression in the Los Angeles County Case and Beyond," EVALUATION REVIEW (December, 1991)

Understanding and Prediction of Large Unstable Systems in the Absence of Basic Equations," PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM ON CONCEPTUAL TOOLS FOR UNDERSTANDING NATURE (with V. I. Keilis-Borok, Trieste, Italy, 1991).

"The Self-Organization of American Society in Presidential and Senatorial Elections," in Yu. Krautsov, ed., THE LIMITS OF PREDICTABILITY (with V. I. Keilis-Borok, Nauka, Moscow, 1992).

"The Alternative-Justification Affirmative: A New Case Form," JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (with Charles Garvin and Jerome Corsi, Fall 1973)

"The Alternative-Justification Case Revisited: A Critique of Goodnight, Balthrop and Parsons, 'The Substance of Inherency,'" JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (with Jerome Corsi, Spring 1975)

"A General Theory of the Counterplan," JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (with Daniel Rohrer, Fall 1975)

"The Logic of Policy Dispute," JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (with Daniel Rohrer, Spring 1980)

"Policy Dispute and Paradigm Evaluation," JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (with Daniel Rohrer, Fall 1982)

"New Paradigms For Academic Debate," JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (Fall, 1985)

"Competing Models of the Debate Process," JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (Winter 1986)

"The Role of the Criteria Case in the Conceptual Framework of Academic Debate," in Donald Terry, ed., MODERN DEBATE CASE TECHNIQUES (with Daniel Rohrer, 1970)

"Decision Rules for Policy Debate," and "Debate as a Comparison of Policy Systems," in Robert Branham, ed., THE NEW DEBATE: READINGS IN CONTEMPORARY DEBATE THEORY (with Daniel Rohrer, 1975)

"A Systems Approach to Presumption and Burden of Proof;" "The Role of Empirical Evidence in Debate;" and "A General Theory of the Counterplan," in David Thomas, ed., ADVANCED DEBATE: READINGS IN THEORY, PRACTICE, AND TEACHING (with Daniel Rohrer, 1975)

"Decision Rules in Policy Debate;" "The Debate Resolution;" "Affirmative Case Approaches;" "A General Theory of the Counterplan;" "The Role of Empirical Evidence in

Debate;" and "Policy Systems Analysis in Debate," in David Thomas, ed., ADVANCED DEBATE (revised edition, with Daniel Rohrer and Jerome Corsi, 1979)

C. Popular Articles

"Presidency By The Book," POLITICS TODAY (Nov. 1979) Reprinted: LOS ANGELES TIMES

"The Grand Old Ploys," NEW YORK TIMES Op Ed (July 18, 1980)

"The New Prohibitionism," THE CHRISTIAN CENTURY (Oct. 29, 1980)

"Which Party Really Wants to 'Get Government Off Our Backs'?" CHRISTIAN SCIENCE MONITOR Opinion Page (Dec. 2, 1980)

"Do Americans Really Want 'Coolidge Prosperity' Again?" CHRISTIAN SCIENCE MONITOR Opinion Page (August 19, 1981)

"Chipping Away at Civil Rights," CHRISTIAN SCIENCE MONITOR Opinion Page (Feb. 17, 1982)

"How to Bet in 1984. A Presidential Election Guide," WASHINGTONIAN MAGAZINE (April 1982) Reprinted: THE CHICAGO TRIBUNE

"The Mirage of Efficiency," CHRISTIAN SCIENCE MONITOR Opinion Page (October 6, 1982)

"For RIFs, It Should Be RIP," LOS ANGELES TIMES Opinion Page (January 25, 1983)

"The Patronage Monster, Con't." WASHINGTON POST Free For All Page (March 16, 1983)

"A Strong Rights Unit," NEW YORK TIMES Op Ed Page (June 19, 1983)

"Abusing the Public Till," LOS ANGELES TIMES Opinion Page (July 26, 1983)

The First Gender Gap," CHRISTIAN SCIENCE MONITOR Opinion Page (August 16, 1983)

"Is Reagan A Sure Thing?" FT. LAUDERDALE NEWS Outlook Section (Feb. 5, 1984)

"The Keys to the American Presidency: Predicting the Next Election," TALENT (Summer 1984)

"GOP: Winning the Political Battle for '88," CHRISTIAN SCIENCE MONITOR, Opinion Page (Dec. 27, 1984)

"The Return of 'Benign Neglect'," WASHINGTON POST, Free For All, (May 25, 1985)

"Selma Revisited: A Quiet Revolution," CHRISTIAN SCIENCE MONITOR, Opinion Page, (April 1, 1986)

"Democrats Take Over the Senate" THE WASHINGTONIAN (November 1986; article by Ken DeCell on Lichtman's advance predictions that the Democrats would recapture the Senate in 1986)

"Welcome War?" THE BALTIMORE EVENING SUN, Opinion Page, (July 15, 1987)

"How to Bet in 1988," WASHINGTONIAN (May 1988)

Bi-weekly column, *The Montgomery Journal* 1990—present

The "Thirteen Keys to the Presidency," a system for predicting presidential election results developed by Allan J. Lichtman and Volodia Keilis-Borok has been the subject of dozens of articles published throughout the world. Highlights include three columns by nationally syndicated columnist David Broder, stories by the Associated Press and United Press International, the NEW YORK TIMES, WALL STREET JOURNAL, USA TODAY, CHRONICLE OF HIGHER EDUCATION, WASHINGTON POST, and a Reuters article published in such languages as German, Arabic, Chinese, Japanese, and Spanish.

Lichtman has lectured on the thirteen keys throughout the country and has appeared on Cable News Network, CBS News Nightwatch telecast, Biznet, the C-Span television news network, the Voice of America, and RKO, ABC, and NBC radio networks. In the April 1982 WASHINGTONIAN Lichtman presented what turned out to be a correct forecast of results for the presidential election of 1984. Subsequently, Lichtman developed the "Keys to the Senate" for predicting Senate election results without polls. Lichtman correctly called 30 of 34 1986 Senate races in predictions submitted to the WASHINGTONIAN in September and published a week before the election in the magazine's November issue. See "A Senate Seer," NEW YORK TIMES (November 6, 1986), p. A-28; "Election Forecaster's Crystal Ball Was Right," ATLANTA JOURNAL-CONSTITUTION (November 8, 1986); "Best Prediction," HOUSTON POST, November 15, 1986; "Bull's Eye for Keeper of Keys: Nearly Perfect Score on Senate Races," WASHINGTONIAN (December, 1986). In May of 1988, when George Bush was trailing Michael Dukakis by double-digits in the polls, Lichtman and Ken DeCell published a WASHINGTONIAN article predicting a Bush win in the Fall. The prediction was covered by the NEW YORK TIMES, WASHINGTON POST, CHRONICLE OF HIGHER EDUCATION, and USA TODAY, among other publications.

D. Reviews

Robert W. Fogel and Stanley Engerman, TIME ON THE CROSS: THE ECONOMICS OF SLAVERY, THE NEW REPUBLIC (July 6, 1974)

Burl Noggle, INTO THE TWENTIES, AMERICAN HISTORICAL REVIEW (1976)

Jerome Clubb, William Flanigan, and Nancy Zingale: PARTISAN REALIGNMENT, AMERICAN HISTORICAL REVIEW (1982)

Paul M. Kleppner, WHO VOTED?, JOURNAL OF AMERICAN HISTORY (1983)

Stanley Kelley, INTERPRETING ELECTIONS, JOURNAL OF AMERICAN HISTORY (1984)

Paula Eldot, AL SMITH AS GOVERNOR OF NEW YORK, AMERICAN HISTORICAL REVIEW (1984)

Paul Kleppner, THE THIRD ELECTORAL SYSTEM, JOURNAL OF AMERICAN HISTORY (1988)

Arno Mayer, WHY THE HEAVENS DID NOT DARKEN, WASHINGTON POST (1989)

E. Courses Taught:

Ongoing Courses

The History of the U. S. I & II, The Emergence of Modern America, The U. S. in the Twentieth Century, United States Economic History, Historiography, Major Seminar in History, Graduate Research Seminar, Colloquium in U. S. History Since 1865, The American Dream, The Urban-Technological Era, Senior Seminar in American Studies, Seminar in Human Communication.

New Courses: Taught for the first time at The American University

Quantification in History, Women in Twentieth Century American Politics, Women in Twentieth Century America, Historians and the Living Past (a course designed to introduce students to the excitement and relevance of historical study), How to Think: Critical Analyses in the Social Sciences, Pivotal Years of American Politics, Government and the Citizen (Honors Program), Introduction to Historical Quantification, Public Policy in U. S. History.

TELEVISION APPEARANCES

In 1981 I appeard as a contestant on seventeen consecutive shows of the nationally syndicated quiz program TIC TAC DOUGH. I defeated twenty opponents and accumu-

lated $104,455 in cash and prizes until felled by a question on nursery rhymes. As far as I know I was the top money winner on this show for 1981.

In 1976 I appeared on the afternoon talk show PANORAMA, broadcast in Washington, D.C. In conjunction with my role as co-Director of the Smithsonian Institution —American University Family History Project, I discussed how people can become the historians of their own families.

In August, 1983 my one-half hour talk "Thirteen Keys to the Presidency: How to Predict the Next Election" was aired nationally by C-Span, the Cable Satellite Public Affairs Network. The talk is based on a new system for predicting presidential election results (See WASHINGTONIAN MAGAZINE April 1982) and was originally presented at the 1983 Conventoin of the International Platform Association.

Commentator for Cable News Network on the march on Washington, August 23, 1984 and on the presidential election, July 16, 1984.

Half hour interviews on CBS News Nightwatch, on predicting the results of the 1984 election and on predicting the results of the 1988 election.

Half hour broadcast on C-Span, talk on election prediction presented to the American Association of Political Consultants, December 1986.

Half hour election-eve broadcast on C-Span, 1988

Half hour panel discussion (one of three panelists) on the Reagan Administration in historical perspective, CBS News Nightwatch, January 11, 1987.

More than a dozen Television programs for the United States Information Agency, Worldnet Network.

Several interviews on news shows such as CNN, Today Show, and ABC Nightly News.

RADIO SHOWS

I have participated in more than 200 radio interview and talk shows broadcast nationwide and in cities such as Washington, D.C., New York, Atlanta, Chicago, Los Angeles and Detroit.

ADMINISTRATIVE EXPERIENCE

Director of Forensics, Brandeis University, 1968-71

Director of Forensics, Harvard University, 1971-72

Chairman, New York-New England Debate Committee, 1970-71

Founding Director, The American University Honors Program, 1977-79

Chairman, College of Arts and Sciences Budget Committee 1977-78, 1982-84

Chairman, College of Arts and Sciences Faculty Colloquim, 1983

Chairman, College of Arts and Sciences Task Force on the Department of Performing Arts, 1984-85

Local Arrangements Chairman, National Convention of the Social Science History Association, 1983

Chairman, Rank & Tenure Committee of the Department of History, 1981-82, 1984-85

Senior Consultant to the National Forensics Institute, 1985

Board Member, Center for Congressional and Presidential Studies,1988-

Board Member, American University Press, 1991-

CONFERENCES AND LECTURES

Invited participant and speaker, Bostick Conference on Fogel and Engerman's TIME ON THE CROSS, University of South Carolina, Nov. 1-2, 1974

"Critical Election Theory and the Presidential Election of 1928," Annual Meeting of the American Historical Association, Dec. 1974

"A Psychological Model of American Nativism," Bloomsberg State Historical Conference, April 1975

"Methodology for Aggregating Data in Education Research," National Institute of Education, Symposium on Methodology, July 1975 (with Laura Irwin)

Featured Speaker, The Joint Washington State Bicentennial Conference on Family History, Oct. 1975

Featured Speaker, The Santa Barbara Conference on Family History, May 1976

Chairman, The Smithsonian Institution and the American University Conference on Techniques for Studying Historical and Contemporary Families, June 1976

Panel Chairman, Sixth International Smithsonian Symposium on Kin and Communities in America, June 1977

"The uses of History for Policy Analysis," invited lecture, Federal Interagency Panel on Early Childhood Research, Oct. 1977

Invited participant, Conference on "Child Development within the Family—Evolving New Research Approaches," Interagency Panel of the Federal Government for Research and Development on Adolescence, June 1978

Commentator on papers in argumentation, Annual Meeting of the Speech Communication Association, Nov. 1978

Commentator on papers on family policy, Annual Meeting of the American Association for the Advancement of Science, Jan. 1979

"Phenomenology, History, and Social Science," Graduate Colloquium of the Department of Philosophy," The American University, March 1979

"Comparing Tests for Aggregation Bias: Party Realignment of the 1930's" Annual Meeting of the Midwest Political Science Association March 1979, with Laura Irwin Langbein

"Party Loyalty and Progressive Politics: Quantitative Analysis of the Vote for President in 1912," Annual Meeting of the Organization of American Historians, April 1979, with Jack Lord II

"Policy Systems Debate: A Reaffirmation," Annual Meeting of the Speech Communication Association, Nov. 1979

"Personal Family History: Toward a Unified Approach," Invited Paper, World Conference on Records, Salt Lake City, Aug. 1980

"Crisis at the Archives: The Acquisition, Preservation, and Dissemination of Public Documents," Annual Meeting of the Speech Communication Association, Nov. 1980

"Recruitment, Conversion, and Political Realignment in America: 1888-1940," Social Science Seminar, California Institute of Technology, April 1980

"Toward a Situational Logic of American Presidential Elections," Annual Meeting of the Speech Communication Association, Nov. 1981

"Political Realignment in American History," Annual Meeting of the Social Science History Association, Oct., 1981

"Critical Elections in Historical Perspective: the 1890s and the 1930s," Annual Meeting of the Social Science History Association, Nov., 1982

Commentator for Papers on the use of Census data for historical research, Annual Meeting of the Organization of American Historians, April 1983

"Thirteen Keys to the Presidency: How to Predict the Next Election," Featured Presentation, Annual Confer-

ence of the International Platform Association, August 1983, Received a Top Speaker Award

"Paradigms for Academic Debate," Annual Meeting of the Speech Communication Association, Nov. 1983

Local Arrangements Chairman, Annual Convention of the Social Science History Association (Oct., 1983)

"Forecasting the Next Election," Featured Speaker, Annual Convention of the American Feed Manufacturers Association (May 1984)

Featured Speaker, "The Ferraro Nomination," Annual Convention of The International Platform Association, August 1984, Top Speaker Award

"Forecasting the 1984 Election," Annual Convention of the Social Science History Association Oct., 1984.

Featured Speaker, "The Keys to the Presidency," Meeting of Women in Government Relations Oct., 1984.

Featured Speaker, "The Presidential Election of 1988," Convention of the American Association of Political Consultants, December, 1986.

Featured Speaker, "The Presidential Election of 1988," Convention of the Senior Executive Service of the United States, July, 1987.

Commentary on Papers on Voting Rights, Annual Meeting of the American Political Science Association, September, 1987.

Commentary on Papers on Ecological Inference, Annual Meeting of the Social Science History Association, November, 1987.

Featured Speaker: "Expert Witnesses in Federal Voting Rights Cases," National Conference on Voting Rights, November 1987.

Featured Speaker: "The Quantitative Analysis of Elective Data," NAACP National Conference on Voting Rights and School Desegregation, July 1988.

Panel Chairman, "Quantitative Analysis of the New Deal Realignment," Annual Meeting of the Social Science History Association, Nov. 1989.

Keynote Speaker, Convocation of Lake Forest College, Nov. 1989.

Featured Speaker, The American University-Smithsonian Institution Conference on the Voting Rights Act, April, 1990.

Panel Speaker, Voting Rights Conference of the Lawyer's Committee for Civil Rights Under Law, April, 1990.

Panel Speaker, Voting Rights Conference of the NAACP, July, 1990.

Panel Speaker, Voting Rights Conference of Stetson University, April, 1991.

Panel Chairman, Annual Meeting of the Organization of American Historians, April, 1992.

DEPARTMENTAL AND UNIVERSITY SERVICE

Department of History Council 1973-

Undergraduate Committee, Department of History 1973-77

Chairman Undergraduate Committee, Department of History 1984-85

Graduate Committee, Department of History, 1978-84

Freshman Advisor, 1973-1979

First Year Module in Human Communications, 1977-79

University Committee on Fellowships and Awards 1976-78

University Senate 1978-79, 1984-85

University Senate Parliamentarian and Executive Board 1978-79

University Grievance Committee, 1984-85

Member, University Honors Committee, 1981-82

College of Arts and Sciences Budget Committee 1976-78; 1982-84

College of Arts and Sciences Curriculum Committee 1981-82

Jewish Studies Advisory Board, 1982-1984

Mellon Grant Executive Board, College of Arts & Sciences, 1982-83

Board Member, Center for Congressional and Presidential Studies, The American University, 1988-

Graduate Committee Chairman, Department of History, 1989-

Chairman, Distinguished Professor Search Committee 1991

Member, College of Arts & Sciences Associate Dean Search Committee.

OTHER POSITIONS

Historical consultant to the Kin and Communities Program of the Smithsonian Institution 1974-1979

Along with general advisory duties, this position has involved the following activities:

1. directing a national conference on techniques for studying historical and contemporary families held at the Smithsonian in June 1976

2. chairing a public session at the Smithsonian on how to do the history of one's own family

3. helping to direct the Sixth International Smithsonian Symposium on Kin and Communities in America (June 1977)

4. editing the volume of essays and workshops taken from the symposium

Consultant to the John Anderson independent campaign for president, 1980.

I researched and wrote a study on "Restrictive Ballot Laws and Third-Force Presidential Candidates." This document was a major component of Anderson's legal arguments against restrictive ballot laws that ultimately prevailed in the Supreme Court (Anderson v. Celebrezze 1983). According to Anderson's attorney: "the basis for the majority's decision echoes the themes you incorporated in your original historical piece we filed in the District Court."

Statistical Consultant to the George Washington University Program of Policy Studies in Science and Technology, 1983.

I advised researchers at the Policy Studies Program on the application of pattern recognition techniques to their work on the recovery of communities from the effects of such natural disasters as earthquakes and floods.

Expert Witness on Quantitative Analysis, Political Systems, Political History, and Voting Behavior for the Lawyers' Committee for Civil Rights Under Law 1983-

I have analyzed racial bloc voting, turnout, and registration; socio-economic conditions; political systems; and methodological issues for voting rights cases involving the following jurisdictions: Petersburg, Virginia; Boston Massachusetts; Hinds County Mississippi; the state of Mississippi (voter registration); the state of Missisippi (judicial elections); Springfield, Illinois; Pittsburgh, Pennsylvania; Anchorage, Alaska; Crittenden County, Arkansas;

Red Clay School District, Delaware; the state of Florida (judicial elections). I have also analyzed statistical information on promotion practices for probation officers within the Philadelphia Court of Common Pleas. I prepared written reports for each of the three of the Mississippi cases, the Pittsburgh case, the Red Clay School District case, the Philadelphia case, and the Florida judges case. I presented in-court testimony for the judicial and registration cases in Mississippi, two judicial cases in Florida, and for the cases involving Springfield, Illinois; Crittenden County, Arkansas; and Red Clay School District.

Expert Witness on Quantitative Analysis, Political Systems, Political History, and Voter Behavior for the United States Department of Justice 1983-

I have analyzed racial bloc voting; turnout and registration; socio-economic conditions; political systems; methodological issues for voting rights cases in the following jurisdictions: Greenwood, Mississippi; Halifax County, North Carolina; Valdosta, Georgia; Bessemer, Alabama; Marengo County, Alabama; Dallas County, Alabama; Cambridge, Maryland; Darlington County, South Carolina; the state of North Carolina (judicial elections); Augusta, Georgia; Wicomica County, Maryland; the state of Mississippi; Los Angeles, California, and the state of Georgia (judicial elections, majority vote requirement). I prepared written reports for the cases in Greenwood, Halifax County, Marengo County, Dallas County, Cambridge, Wicomico County, Los Angeles County, and Georgia. I presented in-court testimony for the cases in Dallas, Marengo, Wicomico, and Los Angeles Counties.

Expert Witness on Quantitative Analysis, Political Systems, Demography, and Voter Behavior for State, Municipal and County Jurisdictions, 1986-

I have analyzed matters such as racial and party bloc voting, turnout and registration, annexations, racial demography, political systems, and methodological issues for various state, municipal and county jurisdictions: Claiborne County, Mississippi; Dade County, Florida; Grenada County, Mississippi; Spartansburg, South Carolina; Maywood School District, Illinois; Crete-Monee School District, Illinois; the state of North Carolina; the state of Virginia; the state of Maryland; the state of Texas; the state of Connecticut; the state of Pennsylvania; and Indianapolis, Indiana. I prepared written reports for Claiborne, Grenada, and Dade Counties, Crete-Monee School District, and the states of North Carolina and Virginia. I presented oral testimony on behalf of Claiborne County and the state of Texas.

Expert Witness on Quantitative Analysis, Political Systems, Political History, and Voter Behavior for Private Attorneys: 1986-

I have analyzed matters racial bloc voting, turnout and registration, political systems, political history, annexations, and methodological issues for private attorneys in voting rights cases taking place in Boyle, Mississippi; Cleveland, Mississippi; Mississippi statewide (legislative plan); City of Starke and Hardee County, Florida; Peoria, Illinois; Chicago Heights Illinois; Jefferson County Alabama; Chickasaw, Monroe, Newton, Simpson, and Yalobusha Counties, Mississippi; Columbus County, North Carolina; Kent County, Michigan; Massachusetts statewide (legislative plan); and Michigan statewide (legislative and congressional plans). I have analyzed statistical results of employment decisions by employers for an employment discrimination case, analyzed the history of peremptory strikes of black and white jurors in Hinds County for a death penalty case, and ballot access by third parties in Jefferson County, Alabama. I prepared written reports for all cases except Peoria and Jefferson County and have presented oral testimony in the jury selection case the Starke County case, the Hardee County case; the Jefferson County case; the Monroe County case;

the Chickasaw County case; the Columbus County case; and the statewide Michigan cases.

Expert Witness on Quantitative Analysis, Political Systems, Political History, and Voter Behavior for the ACLU. 1987-

I have analyzed racially polarized voting, the socioeconomic standing of racial groups, and black political opportunities for Henrico and Brunswick Counties, Virginia; and Southern Pines and Moore County, North Carolina. I prepared a written report for the Henrico case and the Southern Pines case. I presented in-court testimony for Henrico, Brunswick, and Southern Pines cases.

Expert Witness on Quantitative Analysis, Political Systems, Political History, and Voter Behavior for the Southern Poverty Law Center. 1990-

I have analyzed racially polarized voting, the socioeconomic standing of racial groups, and black political opportunities for judicial circuits in the state of Alabama. I have prepared a written report and presented oral testimony in this case.

Expert Witness on the U. S. Census undercount for the Mexican-American Legal Defense Fund, 1991-

I have analyzed the impact of the Census undercount on the state legislative plan in Texas. I presented oral testimony in state court.

Historical Consultant to Senator George McGovern for the production of his memoirs 1976-78

This project involved research in oral and documentary sources relating to Senator McGovern's activities from 1968 to 1976. I wrote several hundred pages of background information for the Senator's use.

AFFIDAVIT OF THOMAS B. HOFELLER

CITY OF WASHINGTON)
) s.s.
DISTRICT OF COLUMBIA)

I am Thomas B. Hofeller, being duly sworn upon oath do state: I am currently employed as director of redistricting for the National Republican Congressional Committee (NRCC), located at 3200 First Street, S.E., Washington, D.C. 20003. In 1980, I received a Ph.D. in Government from the Claremont Graduate School, located in Claremont, California. I have offered testimony in numerous court cases involving redistricting in all areas of the country. Among those states are California, Mississippi, Illinois, Michigan, Arizona, Texas, and North Carolina. I have worked on cases for organizations affiliated with both the Republican and Democratic Parties, and for organizations who were both plaintiffs and defendants in Voting Rights actions.

In my capacity as a redistricting consultant, Redistricting Director of the Republican National Committee (1982-83), Director of Computer Services for the Republican National Committee (1982-83), and in my present employment, I have been in a unique position to evaluate redistricting plans for congressional districts from all over the United States. A copy of my resume is attached to this affidavit.

I have previously testified in this case regarding the congressional redistricting and as a result I have examined the prior testimony, exhibits and findings. I have also examined the population and political data produced by the State of Florida and Dr. Richard Scher's study comparing the submitted plans for the state legislature. I have utilized this information in my comparison of the plans. In my comparison, I have concentrated on the two primary federal criteria; one-person, one-vote, and com-

pliance with the Voting Rights Act. Less crucial but still important criteria in my analysis are communities of interest, compactness, contiguity, political fairness and avoidance of unnecessary jurisdictional splits.

As regards to the one-person, one-vote criteria, the plaintiffs' plan (275) has a deviation of plus one or minus 1 person. While a deviation this low is not a crucial factor by itself, It is extremely important when a plan is drawn in conjunction with other criteria, since it limits the number of available options to those seeking to draw lines to their political advantage. As discussed later, this plan apparently attempts to adhere to these criteria and therefore the low deviation guards against political gerrymandering in this plan, as well as guaranteeing that each elector's vote is numerically equal to every other.

I will first give a region by region discussion of the plan, followed by some general comments and a short conclusion.

REGION BY REGION ASSESSMENT OF PLAN 275

PANHANDLE

This portion of Florida contains sufficient population for two senate seats. Both districts are compact, although there are some jurisdictional splits. These were done in order to maintain related communities of interest within each district. For instance, Pensacola Beach, which is on an island, lacks direct road access with the rest of Escambia County. Moreover, Plan 275 does not fragment the black community in Pensacola.

NORTH FLORIDA

The North Florida portion of the Panhandle contains 27 mostly rural counties and has enough population for three Senate seats. In the Plaintiffs' plan, these districts are identified as Districts 2, 5, and 6. As I noted in my congressional testimony, the black communities in this

area share common interests and a history of discrimination that is one of the worst in the state. The black communities in North Florida have been fragmented in every redistricting scheme produced by the state.

Plan 275 ends this fragmentation by maximizing minority influence. The district has a total black population of 44.4%, a black VAP of 41.1% and a total black voting registration of 39%. More significantly, however, is that black voters account for 46% of the registered Democrat voters, and with either an effective voter registration or turnout program, black voters could control the Democrat primary.

Winning the Democrat primary in this part of Florida is tantamount to winning the election. The district is 83.9% registered Democrat and only 13% registered Republican. This part of Florida has never elected a Republican to Congress, State Senate, or State House.

Two black State House members who were elected from demographically similar districts reside in District 2.

District's 5 and 6 in the Plaintiffs' Plan contain the remaining counties in North Florida and protect county and municipal boundaries except in those areas where following such lines would have fragmented the minority community.

NORTHEAST FLORIDA

The area stretching from the St. John River from Nassau to Northern Volusia County, comprises enough population for 3 Senate seats. In Plaintiffs' Plan, these districts are identified as 7, 8, and 9.

In Plaintiffs' Plan (275), District 7 was drawn first for the specific purpose of maximizing minority influence. The district has a total black population of 51.9%, black VAP of 47.9%, and a total black voter registration of 50.3%. The district contains parts of Duval, Nassau, St. Johns, Clay, Putnam, Flagler and Volusia Counties.

Current District 7 (Duval and Nassau) has elected a black Senator since 1982 and has a black population of 48.4%, black VAP of 45.6%, and black voter registration of 50.8%. It should be noted that the current district is 85,815 people under the ideal district population. As a result, the district had to be extended to include minority communities in St. Johns, Putnam, and Volusia.

The ultimate shape of this district in Plan 275 was dictated by the need to reach an acceptable deviation and at the same time avoid unnecessary retrogression of minority voting strength. The plaintiffs' plan meets the one person, one vote criteria and has a total black population of 51.9% and a black VAP of 47.9%.

Districts 8 and 9 in Plaintiffs' Plan (275), contain the remaining portions of Duval, Nassau, St. Johns, Clay, and Flagler Counties and protect city boundaries in those areas not affected by the minority access district 7.

This plan maximizes the integrity of all the communities of interest in the Northeast Florida region.

TAMPA BAY AREA

This portion of Florida includes Pinellas, Hillsborough, Manatee, and Pasco Counties and contains enough population for just over six Senate seats. Plan 275 denominates these districts at 4, 18, 19, 20, 21, 22, and 23.

District 18 in Plan 275 was intended to link the related and cohesive minority communities of Pinellas, Hillsborough, and Manatee Counties. This district has a total black population of 41.9%, black VAP of 36.5%, and black voter registration of 37.1%. Additionally, the district has a hispanic population of 11% and a hispanic VAP of 11.1%. Traditionally, Tampa's hispanic community is predominantely Democrat and, as noted by the Department of Justice, is cohesive with black voters. This same geographic area is currently served in the State House by one hispanic and two black house members, all Democrats:

Dist.	Incumbent	Black% VAP	Black % Reg.	Hispanic % VAP
63	Hargrett (B)	50.4%	60%	13.0%
55	Jamerson (B)	49.4%	50.2%	2.0%
65	Martinez (H)	11.0%	12.2%	31.5%

The success of these candidates indicates that the Senate district in Plan 275 should also allow the minority community the opportunity to elect a candidate of its choice. District 18 in Plan 275 is 67.6% Democrat and only 26.2% Republican. This high Democrat registration should allow the minority community to control the Democrat primary and thereby elect candidates of the minority community's choice. This is similar to the factual situation in *Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989).

Districts 19, 20, 21, and 22 are totally contained within the remaining portions of Pinellas, and Hillsborough Counties, and District 4 includes West Pasco, Hernando and parts of Citrus Counties. These districts appear to protect city and county boundaries in those areas which are not affected by the voting rights district, thereby promoting compactness, contiguity and protecting the communities of interest in these areas. For instance, there does not appear to be an unnecessary combination of urban, suburban, beach and rural communities in this region.

LOWER GOLD COAST

This portion of Florida, which stretches from Broward to Monroe County, contains enough population for just under ten Senate Seats. This three-county area contains approximately 590,000 black residents and Dade County alone contains just under 1 million hispanics. Although this region is politically complex, as the expert's plan for the congressional districts indicates, it is not difficult to draw a fair plan for all which meets the requirements of

one person, one vote and the Voting Rights Act. This plan mirrors the congressional plan used by this Court.

In the Plaintiffs' Plan (275), two black and four hispanic seats were created. These districts are identified as 32 and 36 (black majority), and 33, 34, 35, and 40 (hispanic majority). The remaining districts in this region are identified as 28, 29, 40, 31, and 39.

The following chart illustrates that the Plan 275 districts ensure the black and hispanic communities the ability to elect candidates of their choice while not submerging these diverse communities into each other's districts as has been done in the past.

Black Districts
Plan 275

Dist.	Pop.	% Black Pop.	% Black VAP	% Black V. Reg.
32	323,448	62.9	57.1	53.4
36	323,448	61.8	57.3	62.7

Hispanic Districts
Plan 275

Dist.	Pop.	% Hisp. Pop.	% Hisp. VAP
33	323,448	69.4	71.5
34	323,448	65.2	66.1
35	323,428	55.4	55.0
40	323,448	65.2	66.2

Plan 275 redrew Dade and Broward counties to create two strong black and four strong hispanic districts. Plan 275 recognized the serious degree of polarization between black and hispanic voters in Dade County and avoided placing competing minority interests in the same seat and met the one person, one vote criteria.

Districts 28, 29, 30, 31 and 39 in the Plaintiffs' plan contain the remaining population within the lower Gold Coast and comply with the standards of one person one vote, compactness, and protection of the integrity of municipal boundaries in those areas not affected by the six voting rights districts.

UPPER GOLD COAST

This portion of Florida includes St. Lucie, Martin, Palm Beach, and Northern Broward Counties and contains enough population to comprise four (4) Senate seats. Plan 275 identified these districts as 24, 26, 27, 28, and part of 37.

District 24 avoids the fragmentation of a cohesive minority community. The district has a total black population of 40.5%, black VAP of 35.2% and has a total black voter registration of 30.9%. The district also has an 11% hispanic population—primarily farm workers who traditionally vote Democratic. Historically, these Hispanics who are not of Cuban heritage and vote in a cohesive pattern with the black community with whom they share similar economic interests.

District 24 in Plan 275 connects the Palm Beach County black neighborhoods of Belle Glade, West Palm Beach, Riviera Beach, Boynton Beach and Delray Beach with the black communities in Fort Pierce, Indiantown, South Melbourne, and Okeechobee.

Because District 24 in Plan 275 is 62.9% Democrat and is only 29.8% Republican, the minority community should be able to elect candidates of its choice as discussed earlier in the section regarding the Tampa-St. Petersburg region. Without this district, this minority community would inevitably be thrown into districts which would be amalgamations of rural, beach and suburban areas.

Districts 26, 27, 28 and 37 comprise the remaining portions of Palm Beach, Martin, and St. Lucie Counties and to the extent possible protect city boundaries where the requirements of the Voting Rights Act and one person, one vote do not require otherwise, thereby protecting the non-minority communities of interest.

GENERAL COMMENTS

Dr. Scher's study supports two important points about Plan 275:

1. the plan maintains communities of interest; and,
2. the plan promotes political fairness.

Dr. Scher's study points out that relatively few people are moved to new districts in Plan 275 (paragraphs 66a, 66b, and 77). Alone, this statistic might indicate nothing more than a "status quo" plan but, we know that substantial change was executed by Plan 275 to correct for the population variances revealed by the 1990 census and to eliminate the past fragmentation of the minority community. In order to attain the high correlation of population to prior districts and create a low deviation and a plan that scrupulously protected the minority communities, the architects of Plan 275 had to be making great efforts to avoid dividing existing communities and jurisdictions.

Dr. Scher's analysis of the correlation of Democrats and Republicans who were not moved from their current districts indicates that the drafters of Plan 275 did not attempt to "scramble the egg" or mix up voters in an effort to destroy the apparent incumbents by pairing or forcing them to run in new districts. This point is bolstered further by Dr. Scher's conclusion that 25 of the 40 Senate districts, or 62.5%, are competitive by party. This indicates that the authors of Plan 275 did not have as their goal a partisan gerrymander or the blind protection of incumbents.

RESPONSE TO THE COURT

The Court's order of June 18, 1992, required the parties to submit their proposed expert witness testimony and also directed the parties to respond to seventeen (17) specific questions. I have read the responses to each of the questions which are attached to this affidavit and marked as Exhibit I, and I adopt each as my full and accurate response.

CONCLUSION

In my professional opinion, Plan 275 meets the criteria required of court drawn plans, scrupulous adherence to the one-person, one-vote principle and the protection of minority voting rights. The plan also avoids unnecessary retrogression of existing minority districts and ends the submergence of many minority communities in bloc voting, white anglo districts. In addition, the plan appears to show high regard for the secondary criteria of community of interests, contiguity, compactness, avoidance of jurisdictional splits and political fairness. If the court were to adopt this plan it could be confident that it would be fair as well as meeting all the legal criteria.

/s/ Thomas B. Hofeller
THOMAS B. HOFELLER

(Notarization Omitted in Printing)

AFFIDAVIT OF DARIO V. MORENO

(Plaintiffs' U.S. Exhibit #45)

STATE OF FLORIDA)
) ss.
COUNTY OF DADE)

I, Dario V. Moreno, the undersigned, being first duly sworn upon oath, do hereby depose and state as follows:

PURPOSE OF AFFIDAVIT

The purpose of this affidavit is to comply with the Court's order of June 18, 1992, which requires the parties to submit their proposed expert witness testimony. The order also directs the parties to respond to seventeen (17) specific questions. I have read the responses to each of the questions which are attached to this affidavit and marked as Exhibit I and entitled Response to the Federal Court's Questions. *To the extent that the responses in Exhibit A pertain to Dade County*, they are full and accurate responses.

AFFIANT'S QUALIFICATIONS

1. I am a professor in the Department of Political Science at Florida International University. I received my Ph.D. from the University of Southern California in 1987. I have done extensive research in the area of ethnic politics in Dade County, Florida. I have published the following book chapters that deal with ethnic and racial politics in Dade County and Metropolitan Miami:

a) "Ethnicity & Partisanship: The Case of the 18TH Congressional District in Miami," (Co-authored with Nicol Rae) in Guillermo Gerner *Miami Today* (Miami: Florida International University Press).

b) "The Conservative Enclave: Cubans in Florida, (Co-authored with Christopher Warren), in Rudolfo de la Garza, *Latinos in the 1988 Elections*, (Boulder: Westview Press).

I am currently Working on the following projects dealing with ethnic and racial politics in Dade County:

a) "Florida Hispanics in the 1992 Election, (Co-authored with Christopher Warren), in Rudolfo de la Garza, *Latinos in the 1992 Elections*.

b) "Redistricting in Florida: Tripartite Politics in Florida (Co-authored with Nicol Rae), in Fernando Guerra and Luis Fraga, *Latinos and Reapportionment*.

I have authored the following conference papers and presentations relating to ethnic and racial politics in Dade County, Florida:

a) "The Political Empowerment of Cuban Americans," speech before the Latino/Latina Leadership Opportunity Program, University of California at Los Angeles.

b) Cuban-American Political Empowerment," Inter-University Program for Latino Research National Conference: Latino Research Perspectives in the 1990's, Pomona, California.

c) "Recruitment of Latinos in Graduate School," Annual Meeting of American Political Science Association, Atlanta, Georgia.

I have also appeared as an expert political commentator on various local and national television programs dealing with Hispanic voting behavior in Dade County. I was also named by the President of the American Political Science Association to the Committee on the Status of Latinos.

2. I am familiar with the pattern of ethnic voting in Dade County through the research required by the above

listed book chapters, conference papers, and presentations. In addition, I have reviewed the various districting plans submitted by plaintiffs, defendants, and others, for Congress, State Senate, and State House. From that research and review, I have determined certain facts and certain opinions, which are listed below.

I. Introduction

3. Dade County is profoundly divided by the competing interests of three distinct and separate ethnic groups. The Black, Hispanic, and non-Hispanic White communities all have different social and economic interests. The division of Dade along ethnic lines has made Miami the contemporary symbol of racial upheaval in America. The deep ethnic tensions in Dade are illustrated by the fact that four times in the 1980's the county was rocked by race riots. The cleavages between the "community of interests" of the three major ethnic groups has led to the development of tripartite politics in Miami. "Tripartite politics" refers to the notion that ethnic factors between the three communities predominate over all other factors in Dade politics. The existence of competing "community of interests" between the different ethnic groups is demonstrated by the fact that Blacks, Hispanics, and non-Hispanic Whites each live in compact and contiguous neighborhoods, are politically cohesive, vote in blocs, and are politically polarized from each other.

4. The complex political geography and ethnic politics of Dade requires a redistricting plan that takes into account the interests of its different communities. The current districting arrangements as well as Senate Joint Resolution 2G do not fully recognize the interests of the Hispanic and Black communities in Dade.

II. Geographic Compactness and Cohesion

5. The three ethnic groups are not spread uniformly across the metropolitan area but instead reside in a mixed pattern of enclaves and neighborhoods. The gulf between

Dade's different ethnic groups and the effects of lingering segregation were clearly revealed in a recent poll which showed that 42 percent of the Anglos and 45 percent of the Hispanics live in neighborhoods that contain no Blacks. At the same time, 26 percent of the Anglos live in neighborhoods without Hispanics.

A. Hispanics

6. Dade county's Hispanic community is not only geographically compact but it is also politically cohesive. Based on the 1990 census, Hispanics make up only 12.16 percent of the state's total population, (1,574,143 out of 12,937,926) a rather small proportion when compared to other Latino population centers in the United States. Greater Miami, however, ranks third in the nation, behind only Los Angeles and New York, in the size of its Hispanic population. When one considers that the Miami area has a substantially smaller overall population than either of these other two cities, and that almost all of the Hispanic population has settled in the city since 1960, it is of little surprise that the Metro-Dade Planning Department claims that Miami has undergone the single most dramatic ethnic transformation of any major American city in this century. According to the census, well over 60 percent of all Hispanics living in Florida reside in Dade County. The 1990 census shows that about 51.2 percent of the population of Dade county is Hispanic. (See Table 1 and Table 2)

7. The 1990 census figures illustrate the dramatic increase in the Latin population during the last ten years. It is estimated that during the 1980's over 300,000 Latin Americans moved into Dade County. At the threshold of the decade there was the Mariel boatlift which brought in 125,000 Cuban refugees, often poorer than Cubans who had come earlier. Around the same time 70,000 Nicaraguans who fled the Sandinista regime and civil war arrived. Colombians, Peruvians, Hondurans, Guatemalans, each escaping turmoil in their countries soon fol-

lowed, melding into Dade's flourishing Hispanic community and taking advantage of the political space created by Cuban-Americans during the 1980's. (See Table 3) The total Hispanic population of Dade County is 953,407 of which about 55 percent is Cuban-American.

8. The state's Hispanic population is not only concentrated in the Miami area, but within Dade County, distinctive neighborhood settlement patterns have also tended to concentrate the Hispanic population in well defined areas. Hispanics have basically settled in three sections of Dade. The traditional concentration of Hispanics is the Little Havana section of the City of Miami, where Cuban refugees first settled in the early 1960's. Sections of Little Havana range from about 70 to 90 percent Hispanic, and most of the 239,400 Cubans in the City of Miami live in this section of town. The most rapid Hispanic growth (Cubans, Nicaraguans, and South Americans) in the county is taking place in the West Dade area, made up of the communities of Sweetwater, Village Green, Westchester, and West Kendall, where Hispanics make up over 70 percent of the population. The third area of Hispanic, mostly Cuban, concentration is the Northwest section of the county which consist of the cities of Hialeah, Miami Springs, and their surrounding neighborhoods. These areas range from 55 to 85 percent Hispanic. In addition there is a sizeable Hispanic, mostly Mexican, farm-worker's community in the Homestead area.

9. The largest number of Hispanics in Dade County are Cubans. The Cuban community in Dade traces its modern roots to Fidel Castro's revolutionary victory on January 1, 1959. During the ensuing 30 years, more than 750,000 Cuban refugees arrived in the United States, most passing through Miami. By 1985, the Census put the number of Cuban's living in the U.S. at 1,036,000. Most Cuban-American settled in Miami or returned to the city after first settling in the North, and thus over half of the nation's Cuban-Americans lives in Dade county.

The formation of a Cuban enclave in Miami has also proven to be an important factor in explaining the arrival of other Hispanic groups in Miami. The relative prosperity of the Cuban community and their large numbers in cohesive and contiguous neighborhoods have safeguarded other Hispanic groups from the language discrimination that has plagued other Latins in the United States. Dade County's Hispanic enclave became a community where Spanish-speaking immigrants could settle without fear of being at a serious disadvantage because of the language barrier. The 1990 census showed that Spanish has replaced English in Dade as the language most often spoken at home. Fifty percent of those surveyed in 1990 said they spoke Spanish at home, compared to 43 percent who spoke English.

10. The fear of language based discrimination has served to unite Dade's Hispanic communities. The fear of an anti-Spanish backlash has been reinforced by English only initiatives, at both the county and state level, which seemed to be specifically aimed at Miami's Latin population. In November 1980 Dade voters approved an ordinance prohibiting the use of any language other than English in county business. This ordinance overturned a Metro ordinance passed several years previously that had established Dade County as "officially bilingual." The petition drive and resultant referendum turned into a name calling contest between Hispanics and Non-Hispanic communities. A poll taken at the time of the referendum indicated that nearly half of those voting for the ordinance did so in order to express their "protest" and "frustration" with Dade's Latinos and not because they thought the ordinance was a good idea. The voting on the ordinance was extremely polarized: 71 percent of Non Hispanics who voted supported the ordinance, 85 percent of Latins opposed it. Similarly, in 1988 Florida voters overwhelmingly approved Proposition 11. This proposition was the "English as official language" amendment to the Florida state constitution. Hispanics were again the only group

that opposed the amendment in another extremely polarized election, voting over 80 percent against the measure. However, the measure was approved by Dade County voters by 61 percent and passed state-wide with over 80 percent of the vote. The vote on this proposition was strictly along ethnic lines in Dade as Blacks supported its passage by about 80 percent and Non-Hispanic White by over 80 percent. The easy passage of Proposition 11 reinforced the feeling in the Hispanic community that the Spanish enclave created by Cuban exiles was surrounded by hostile English speaking communities.

11. The Cuban-American community has taken the lead in defending the right of the Spanish-speaking minority (majority) in Dade county through the development of its own anti-discrimination institutions, and through quick reactions to discriminatory behavior. The Spanish American League Against Discrimination (SALAD) is particularly noteworthy for its work in this area. Spontaneous citizen action also plays a significant role. For example, in the aftermath of the passage of Proposition 11, a supermarket clerk was suspended for speaking Spanish in front of customers. The Hispanic community's reaction was swift and effective. The store in which the incident occurred received over twenty bomb threats, picket lines were set-up, and the powerful Spanish-speaking radio stations began organizing a boycott of the supermarket chain. Less than forty-eight hours after the incident, the company announced that the clerk would be reinstated, the offending manager transferred out of Dade County, and the store issued a public apology to their Spanish-speaking customers. Afterwards, the chain conducted an extensive campaign in the Spanish-speaking media to regain their share of the Hispanic market. Hispanic vigilance against language based discrimination was reinforced when news broke in April, 1992 that a personnel agency refused to refer people with foreign accents to job openings at a Miami bank.

12. The cohesiveness of Dade's Hispanic community has also been buttressed by the ideological affinity of its two largest groups (Nicaraguans and Cubans). Nicaraguan exiles, who fled the leftist Sandinista regime, shared the same fervent anti-communism as their Cuban neighbors. The Cuban and Nicaraguan exiles continue to work together for a conservative foreign policy agenda. Congresswoman Ileana Ros-Lehtinen presented Nicaraguan President Violeta Barrios de Chammorro, during her April 1992 state visit, with a list of properties seized by Marxist Sandinistas which has yet to be returned to their original owners.

B. Afro-Americans

13. Dade County's Afro-American community, while not as geographically compact and cohesive as the Hispanics, is also well within the Voting Rights Act standards as far as being geographically compact and politically cohesive. The 1990 census shows that Blacks comprised 16.57 percent (369,621) of the population of Dade county. Overall, there are about a dozen identifiable Black neighborhoods, from the densely populated housing developments in Liberty City (which is not a city at all, but a mostly unincorporated area, bordering the city of Miami in northwest Dade), to the sparsely settled Black neighborhoods in the southern agricultural sections of the county. The largest Black communities are found in the Northern area of the county, beginning in the Overtown neighborhood adjacent to Downtown Miami, going northwest through Liberty City, Opa Locka up to the Broward county line. In addition to these contiguous black neighborhoods in the Northern part of the county, there are substantial pockets of Black population in the Southern portion of the county in Coconut Grove, South Miami, Richmond Heights, Gould, and Florida City.

14. Black settlements patterns have had a profoundly negative effect on political mobilization. Historically, due

to both the legacy of Southern racism and the conscious placement of some Black settlements in the unincorporated areas of the county, Blacks play an almost insignificant role in local politics. Although the City of Miami has always had a substantial Black population, and while there has been some Black resettlement in other Dade municipalities, especially Opa Locka and Florida City, over 60 percent of Black Miamians live in unincorporated sections of the county. This settlement pattern, and the extent to which it undermines black influence in local government and complicates grass-roots organizing, stands as a formidable barrier to political mobilization. These factors, along with the at-large county and City of Miami elections, combine in compounding the obstacles faced by Blacks in shaping public policy in Dade.

15. Blacks are also the most disadvantaged of the three major ethnic groups that live in the Greater Miami area. In all social-economic indicators Afro-Americans are the worst off of Dade county's citizens. For example, according to estimates of Dade County Planning Department, only 1 percent of local businesses belong to Blacks. The average median family income for Blacks was $20,209 compared to $23,446 for Hispanics (Cubans, the most affluent of Latinos, averaged $26,770), while Whites enjoyed the highest at $35,977. Blacks are also more likely to feel the effects of discrimination. According to one poll 34 percent of Miami's Black community said that they or someone they know faced discrimination in seeking a job or promotion. (See Table 5) Education for Blacks is also far below the standard for Hispanics and Whites. According to Dade County Public Schools six out of the seven senior high schools that were designated as deficient last year because of low test scores were predominately Black (Carol City, Edison, Jackson, Norland, Northwestern, and Miami Central). Moreover, Black dropout rates were the highest at 8.9 percent, compared to 7.2 percent for Hispanic students and 5.5 percent for Whites.

16. Miami's Black community facing discrimination, poverty, and not participating in local decision-making has erupted in violence four times during the 1980's. The Black neighborhoods of Liberty City experienced, what was by some measures, the most violent riots of the century in May 1980 and Overtown experienced several nights of disorder in December 1982, in the Spring of 1984 and again in January 1989. The immediate reason for these riots was the police shooting of Black residents but these disturbances also reflect the frustration of the Black community with the small number of Black police officers, the violent acts of some police officers toward Black citizens, the absence of Black owned businesses—indeed, poverty, unemployment, ethnic tensions, and powerlessness in general.

17. In 1990 the Miami Black community used a more sophisticated tactic to express its grievance against the White and Hispanic elites with the Black boycott on Greater Miami. A boycott of the Miami tourism and hospitality industry was called by the Black community in 1990 to protest their marginalized status. The event which instigated this Black "empower" movement was the less-than-dignified treatment given the African National Congress (ANC) leader, Nelson Mandela, when he addressed a labor conference in South Florida in June, 1990. But the demands of the protestors, who call themselves Boycott Miami: Coalition for Progress, go beyond formal apology and redress; they attack the economic lifeline of Miami, the tourism industry in hopes of redressing the grievances of the African-American community.

18. Winnie and Nelson Mandela were not officially greeted nor honored by any elected body in Dade County, after Mandela recognized on the television show "Nightline" three long-time, loyal supporters of the ANC's anti-apartheid struggle: Cuban president Fidel Castro, Palestine Liberation Organization leader Yasser Arafat, and Libyan leader Colonel Moammer Gadhafi. The conven-

tional explanation of the snub that followed is that these three men had many enemies in Miami: anti-Castro/anti-communist immigrants, Pro-Israel Jews, "patriotic Americans" who hate Gadhafi, and many others who find few good words to say about these men.

19. The Koppel broadcast energized Miami's influential Hispanic radio personalities causing many of the area's political elite to seek maneuvers to placate angered constituents. Not wanting to appear individually nor regionally as racist, the same mayors who might have once welcomed Mandela suddenly felt pressure from constituents not to do so. Ultimately official welcomes prepared for presentation to Mandela were rescinded. In the case of the City of Miami, the welcome was replaced by a joint statement from five mayors (Miami, West Miami, Hialeah, Hialeah Gardens, and Miami Beach) in which Mandela was congratulated for his new found freedom and admonished for his support of human rights violations in Cuba.

20. The obvious pandering to the Cuban and Jewish communities at the expense of the black community further marginalized the latter. Angered and outraged at the politically motivated show of disrespect by the White and Hispanic political establishment for a Black international hero, Boycott Miami: Coalition for Progress was born. As a formal political coalition, the Black community directly confronted the local business elite with something more frightening than any riot, the gutting of the economic foundation of South Florida, its convention and tourism industry. "The boycott is the most potent economic empowerment weapon blacks have." According to Ty Stroh, Vice-President for sales of the Greater Miami Convention & Visitor Bureau (GMCVB) "lost convention revenue in 1992-1995 could be as much as $12 million . . . . It's not a large percentage but it is an important percentage."

C. Non-Hispanic Whites

21. The non-Hispanic White population is rapidly declining, falling from about 80 percent of the county total in 1960, to less than 33 percent in 1990. The two major municipalities in Dade that are still politically dominated by non-Hispanic Whites are Miami Beach and Coral Gables, but in both these cities the Hispanic population is growing fast. While several of the smaller municipalities have predominately non-Hispanic White population, the important bases of local Anglo power are the county government and the downtown business section. The downtown section serves as home to the Metro government offices and most of the large business, legal, civic, and media institutions that are involved in community affairs—most of which are primarily run by non-Hispanic Whites. The tension between these institutions and the growing Latin populations is reflected in the current feud * * * the President of the Cuban-American National Foundation * * * Canosa and the Publisher of the *Miami Herald* David * * * the Herald's editorial policy.

22. The non-Hispanic White population has also been able to retain considerable political power by maintaining control of Dade's delegation to both Washington and Tallahassee. Although, they represent less than a third of the county's population, non-Hispanic Whites comprised ten out of the twenty members of the Dade delegation to the state House, control three out of the seven state Senate seats, and three out of the four seats in the U.S. Congress. The over-representation of this community is a factor of favorable districting and their control over Dade's business and media establishment.

III. Voting Behavior

23. In determining the voting behavior of ethnic groups in Dade I used extreme case also called homogeneous case analysis. In this test the vote results of different precincts of racial and ethnic homogeneity are com-

pared. I used 85 percent for Blacks, 85 percent for non-Latin White, and 70 percent for Hispanic. The Hispanic is lower, because the Metro-Dade Election Department only counts as Hispanics those Latins born outside the United States or in Puerto Rico. Thus there is an under count of Hispanics in the registration rolls of Dade County. In my analysis of voter polarization I selected those races where the candidates of choice of Black, non-Hispanic White, or Hispanic voters could be compared. Also I compared the results over time to see if there was a pattern of homogenous precincts consistently voting in opposite ways. This is how I inferred that polarized voting has taken place.

24. The political cohesiveness of the Black and Hispanic communities is further underscored by their voting behavior. Both communities engaged in bloc voting.

A. Bloc Voting

25. The 1988 Presidential election saw Cuban-Americans in Florida vote overwhelmingly Republican. George Bush carried the Hispanic precincts of Dade County (Miami) with over 85 percent of the vote, while another conservative Republican, Connie Mack, carried those same precincts in Florida's U.S. Senate race with about 80 percent of the vote.

26. These 1988 eelction results underscore the pattern of strong Cuban loyalty to the GOP—a pattern which was more latent through the 1970's, but which was then dramatically reinforced in the 1980 presidential election when over 80 percent of the voters in the predominantly Cuban precincts voted for Ronald Reagan, and again in 1984 when they gave Reagan over 85 percent of the vote. Thus, the Cuban vote stands in stark contrast to that of other Latinos across the U.S. who have consistently supported the Democratic ticket by two-to-one margins. For instance, polls indicate that in 1988, Michael Dukakis received 70 percent of the Latin vote

nationwide, whereas in Miami's heavily Cuban precincts, Dukakis only received 15 percent of the vote—almost a five-to-one contrast between the votes of Cuban and those of other Latins across the country.

27. The Hispanic population of Dade County loyalty to the GOP is across the board and has had a profound influence on both local and state politics. In addition to the largely Hispanic precincts in Dade voting strongly Republican in the 1980, 1984, and 1988 presidential elections, a profile of recent state-wide elections shows a similar process of declining support for the Democratic party among Cubans. The 1982 Governor's race saw Bob Graham, a moderate incumbent from Mami, carry the Hispanic precincts of Dade County with about 60 percent of the vote against a weak Republican opponent. At the same time, another moderate Democrat, Lawton Chiles, was re-elected to the U.S. Senate, carrying a similar margin of the Latin vote. However, by 1986, the Cuban vote was firmly in the Republican column. Graham, who was now running for the U.S. Senate against a weak Republican incumbent, Paula Hawkins, received only about 24 percent of the vote in the Hispanic precincts of Dade, although he was able to carry the country with 56 percent of the vote. Then, in the 1986 Governor's race, Republican Bob Martinez carried the Hispanic precincts of Dade over his Democratic opponent, receiving 79 percent of the vote. Thus, the pattern of disproportionate Cuban support for the Republicans was firmly established by the time of Florida's 1988 Senate race to fill Lawton Chiles' seat. In that contest, as we noted above U.S. Representative Connie Mack carried the Hispanic precincts of Dade with over 80 percent of the vote in an otherwise extremely close race against Democratic House member Buddy McKay. Mack lost the county-wide vote, but the Latin bloc still proved to be a decisive factor in Mack's victory. The Hispanic support for Republican candidate was again demonstrated in the 1990 Governor race, when the Latin

precinct voted two-to-one to return Martinez to the Governor's mansion despite a powerful challenge from ex-Senator Lawton Chiles. Chiles carried Dade with 63 percent of the vote. (See Table 6)

28. After the 1982 reapportionment, and a shift from multi-member to single-member House and Senate districts, the 1982 election brought a change in the Democratic domination of the delegation. Cuban-American Republicans captured three lower house seats in the newly created, heavily Hispanic districts. A fourth Cuban Republican lost by the narrowest of margins after the absentee ballots were counted. While not the first Cubans to serve in the Florida legislature (Fernando Figueredo of Key West served in the House during the 1885 session) 1983 marked the introduction of Cuban-Americans as a permanent fixture in state legislative politics.

29. The change in Cuban-American voting behavior was accompanied by a similarly dramatic change in Hispanic voter registration. In less than 10 years, Democratic party registration among Hispanics in Dade County, dropped from 49 to 24 percent. The resultant increase in the ranks of Republican Hispanics has therefore been remarkable, increasing from 39 to 68 percent of all registered Hispanics. In fact, while overall Hispanic registration has increased by over 56,000 during the past nine years, Hispanic Democratic registration has faced a real loss of over 14,400. Thus, new Hispanic registrants are not only registering as Republicans, but voters are changing their registration, leaving the Democratic party by the thousands. Moreover, prominent Florida Hispanics have abandoned the Democratic party in significant numbers, such as Governor Bob Martinez, State Representative Lincoln Diaz-Balart, and City of Miami Mayor Xavier Suarez.

30. Black Miamians also vote in blocs. The nationwide pattern of strong Black support for the Democratic

party is repeated in Dade. Black registration is 90 percent Democratic. The antipathy of Black voters to Republican candidates is illustrated in recent presidential and state-wide races were no GOP candidate received more than 12 percent of the Black vote. (See Table 7) Blacks also vote heavily for Democratic candidates in state House and State Senate elections.

31. Consequently, Dade's black community has been historically under-represented in the county's delegation to Washington and Tallahassee. No Black has ever been elected to Congress from Dade, although Afro-Americans make up nearly one-fifth of the county's registered voters and there is a large Black population in adjoining Broward county. Blacks benefitted from the 1982 reapportionment and the shift from multi-member to single-member House and Senate district, but they are still under-represented at the State Legislature. After the 1982 reapportionment Blacks gained only one more seat to the State House (going from two to three) and won their first State Senate seat. In 1990, Black's picked up their fourth House seat from Dade, when Daryl Jones won the race in the 118th District. But the District's Voting Age Population is less than 30 percent Black making the seat vulnerable to a White challenger.

32. Non-Hispanic Whites also show some indication of partisan bloc voting. Traditionally, Dade's county White voters are among the most liberal in Florida, and tend to support Democratic candidates for state office. Dade county voters only once supported the Republican candidates for the U.S. Senate or Governor since 1970 (Bob Martinez 1986). However, in that election non-Hispanic White voters supported the Democratic candidate. At the same time, since 1970 Dade voters have only supported the Democratic presidential candidate once (Jimmy Carter in 1976). Although Dade's non-Hispanic Whites voters supported GOP presidential candidates in 1972, 1980, and 1984; they did slightly support

Democrat Michael Dukakis in the 1988 election. (See Table 8) Thus, while not as dramatic as the heavy Hispanic backing for Republican candidates and Black support for the Democrats, Dade's non-Hispanic Whites do exhibit some indication of political cohesiveness. However, when ethnic or racial factors dominate an election Whites vote overwhelmingly in blocs.

B. Polarization

33. The ability of either the Hispanic or Black communities to elect candidates of their choice is severely handicapped in Dade by bloc voting along ethnic lines. Minorities are usually only able to elect their candidates when they are firmly in the majority. Moreover, White candidates are aided by the deep cleavages between Republican Hispanics and Democratic Blacks. In Dade's tripartite political structure non-Hispanic White voters tend to hold the balance of power. There are four types of racially polarized elections in Miami: First, are races featuring a Hispanic candidate versus a White candidate with Black supporting the White candidate; Second, a Black candidate versus a White candidate with Hispanic voters supporting the White candidate; third, a Black candidate versus a Hispanic candidate with White voters holding the balance of power, and finally they are races between two candidates of the same ethnic group in which voters from the other two group support the least ethnic of the two candidates.

34. the recent special election in Florida's 18th Congressional district—held for twenty eight years by Representative Claude Pepper—is one of the clearest examples in recent years of a campaign and election in which ethnic factors predominated over all others. This election largely demonstrates the capacity of ethnicity to override partisanship and all other issues in a particular context. Political newcomer Gerald Richman was able to mobilize the districts non-Hispanic groups (Blacks and

Anglos) in a campaign to stop the Cubans. In so doing he was able to turn what had looked like a walkover for the Republicans into a very close race. However, in turning the election into a referendum on Cuban empowerment, Richman also guaranteed that he would eventually lose the election.

35. In the race to succeed Claude Pepper to Congress, Ros-Lehtinen easily won the republican nomination, facing only token opposition. On the Democratic side, four major candidates entered the race, the front runner was Miami City Commissioner Rosario Kennedy, a Cuban-American who was convinced by Democratic State Chairman Simon Ferro to run, lawyer and political newcomer Gerald Richman, Claude Pepper's niece Joanne, and FIU professor and black community activist Marvin Dunn. Kennedy won the first primary but was forced into a run-off by a strong showing from Richman. The run-off campaign between Kennedy and Richman became a bitter ethnic confrontation, indeed apart from ethnicity, there was little else to divide the candidates. Kennedy took particular exception to Richman's 'American Seat' slogan regarding it as a subtle exploitation of resentment against Cuban-Americans like herself. She picked up valuable endorsements from Joanne Pepper and from defeated Black candidates Dunn and Wright. Richman, by contrast, found himself condemned by Dade's Fair Campaign Practice Committee—a bipartisan, quasi-official, 'watchdog' body—the Miami Herald (which backed Kennedy), and the Spanish-American League Against Discrimination for his 'divisive' 'American Seat' slogan. Richman easily defeated Kennedy in the second primary with over 60 percent of the vote mainly due to his lock on the Miami Beach vote. Kennedy's Labor and Black endorsement were insufficient to withstand the groundswell of Democratic support for Richman, who seemed to have catalyzed Anglo discontent with Miami's increasingly dominant Cuban-American political establishment, to astonishing extent.

36. The general election campaign was even more dominated by the 'ethnic issue' than the primary had been. Richman failed to get the endorsement of an embittered Rosario Kennedy, and Dade's only other prominent Cuban Democrat—Hialeah Mayor Paul Martinez was forthright in his condemnation of Richman's campaign tactics:

> If you really care about the community, you cannot vote for this man. I do not think that his campaign is what the Democratic party stands for.

Ros-Lehtinen also attacked Richman as a 'bigot', and announced that she would not engage in any face-to-face debates with him during the campaign. The campaign subsequently became extremely embittered, with Ros-Lehtinen largely evading other issues and concentrating her attacks on Richman's 'bigotry', and Richman, accusing Ros-Lehtinen of using bigotry as an excuse for not facing up to a debate on issues such as abortion and gun control—on which his views were more in line with those of the district than hers.

37. The campaign strategies of both campaigns were based purely on ethnic calculations. The race came down to a pure ethnic conflict, despite Richman's attempt to back-peddle from his earlier rhetoric. Ros-Lehtinen abandoned attempts at 'bridge-building' with Jews and Blacks, and concentrated on mobilizing her Cuban base. Polls indicated however, that Richman's cultivation of the ethnic issue had turned what initially looked to be an easy election for the Republicans into a very close race. Miami Herald polls showed the two candidates to be neck-and-neck with the whole election largely to be decided by the ethnic turnout factor.

38. On election day Gerald Richman was defeated by a large and monolithic Cuban-American vote. Richman's "American seat" slogan which was the key to victory in the Democratic runoff proved to be a two-edged sword. Cuban-Americans offended by the perceived racism of the Richman voted for Ros-Lehtinen

by the remarkable margin of 88 to 12 percent. The mobilization of the Cuban community around the Ros-Lehtinen was overwhelming and impressive. Local Cuban media, five radio and two T.V. stations, bombarded the airwaves on election day with anti-Richman propaganda including the dubious claim that Fidel Castro himself had endorsed the Democratic candidate. Richman carried all of the other blocs of voters: Jewish, Anglos, and Blacks but they represented only 47 percent of the electorate. High Cuban turnout—some Little Havana precincts reported 70 percent turnout—provided Ros-Lehtinen with the margin of victory, 53 percent of the votes. Ros-Lehtinen won simply because more Cubans voted and almost all of them voted for Ros-Lehtinen.

39. The electorate in the 18th Congressional District became divided along ethnic lines not because Cubans changed their voting behavior, but because other groups rallied around Richman in a futile attempt to "stop the Cubans." (See Table 9) The tragedy of the 1989 Special election was that Richman's coded call to U.S.-born voters ("this is an American seat") to stop the Cuban candidate, which included Kennedy in the Democratic primary and Ros-Lehtinen in the general election, worked. In the general election Richman carried all the non-Cuban groups in the district (Anglos, Blacks and Jews) according to the *Miami Herald* exit poll he even won among Republican Anglos 55 to 45 percent.

40. Ros-Lehtinen while not differing in any significant policy issue with Bush, Mack or Martinez did very poorly among their non-Hispanic supporters in the Eighteenth District. The Cuban Republican candidate ran nearly twenty percent behind Anglo Republicans in the non-Hispanic white precincts of Dade county. (See Table 10) Two communities reflect just how ineffective Ros-Lehtinen's campaign was among non-Hispanic groups. Bal-Harbour an affluent non-Hispanic White neighborhood which gave President Bush 50 percent, Mack 44 percent,

and Martinez 52 percent of the vote gave Ros only 16 percent. Similarly in the heavily Republican island of Key Biscayne, Ros received barely 48 percent of the vote, while Bush received 70 percent, Mack 59 percent and Martinez 68 percent.

41. The anti-Latin nature of the Richman's support is reflected in its close correlation to the yes vote on Amendment Eleven in the 1988 election. Proposition Eleven was the "English as official language" amendment to the Florida state constitution. Hispanics were the only group that consistently opposed the amendment, voting over 80 percent against the measure. A district-wide analysis shows that the Ros votes correlates more closely with the no vote on Amendment 11 than with that of any other Republican candidate. (See Table 11) This trend is even more pronounced in the non-hispanic precincts, in those areas Ros-Lehtinen votes only correlated with the no on Eleven vote (.8132) compared with very low correlation betwen her vote and the votes of other recent GOP hopefuls: Bush (.2659), Mack (.5810), and Martinez (.0355). (See Table 12)

42. Although, not as dramatic as the Ros-Lehtinen election, several other Dade races have witnessed the creation of anti-Cuban coalitions of Blacks and non-Hispanic Whites. The 1990 general elections saw several of these polarized races. In three legislative and two county-wide contests Hispanic candidates were opposed by formidable ethnic coalitions. Two Hispanic candidates lost county-wide races for School Board and Clerk of the Circuit Court as Blacks and Anglos voted along ethnic lines for the Non-Hispanic White candidate. An analysis of homogenous ethnic precincts showed that Evaristo Marina lost his bid for the School Board, when 80 percent of the Whites and 92 percent of the Blacks voted for his Anglo opponent. Similarly Tony Cotarelo lost his bid for Clerk of the County Court when 68 percent of the Anglos and 96 percent of the Blacks voted for the non-Hispanic White candidate. Both Marina and Cotarelo

were the candidates preferred by the Hispanic community receiving 71 and 92 percent of the Latin vote respectively.

43. In the 1990 general elections two Hispanic incumbents almost lost their seats in the state legislature to non-Hispanic Whites challengers. It is important to note that in both of these races the *Miami Herald* endorsed the Anglo candidates. Javier Souto was barely re-elected to the State Senate from the 40th district when Tom Easterly won 74 percent of the non-Hispanic White votes and 92 percent of the Black vote. Souto was able to squeak by his Anglo opponent (36,066 to 33,955) by winning over 80 percent of the Hispanic vote. State Representative Al Gutman also almost lost his 105 district seat to a non-Hispanic White candidate. Political newcomer Steve Leifman won 42 percent of the vote in this heavy Hispanic district by carry two-thirds of the non-Hispanic White votes and 83 percent of the Black votes. Gutman survived by winning 92 percent of the Hispanic vote. Meanwhile, Hispanic challenger Orlando Cruz was easily defeated by incumbent Art Simon in another ethnically polarized election in the 116 district despite the fact the Cruz carried 77 percent of the Latin vote. Simon easily won the election (71 to 29 percent) by winning 85 percent of the non-Hispanic White vote. (See Tables 13A and 13B)

44. Unfortunately this pattern of ethnic polarized voting against Hispanics was not restricted to the 1990 elections. Hispanics candidates have been plagued by anti-Latin coalitions since they started contesting elections in large numbers after the 1982 reapportionment. The pattern of bloc voting by non-Latin Whites and Blacks against Hispanics is found in elections at all levels against both Latin challengers and incumbents. The nature of tripartite politics in Dade means that only when Hispanics have a super majojrity can a Latin candidate win.

45. Black candidates have also suffered due to the tripartite nature of Miami politics. Afro-American can-

didates faced the same type of ethnic based anti-Black coalitions that Hispanics encounter. Moreover, fewer Black candidates have aspired to county-wide or Congressional elections. Urban specialists postulate that this is usually due to the heavy financial cost such a race would involved. While Black candidates have been able to raise the relatively modest amount needed to finance state House and Senate elections, much of it from their own communities, Black candidates who are not supported by the non-Latin White communities have not been able to raise the monies from their own communities to finance a county-wide or Congressional election.

46. Black candidates faced with a White-Hispanic coalition and lacking adequate finances have largely been limited to running in the three state House districts (106, 107, 108) and in the one state Senate district (36) were Blacks comprised an overwhelming majority. The only exception, besides the occasional token Black Republican involved in a hopeless race, was the case of state House district 118. Blacks, while comprising only 29 percent of the population, have a much greater influence because most of the Hispanics in the district are not U.S. citizens (many are undocumented migrant farmworkers from Mexico). Thus Blacks are over a third of the registered voters and a majority of Democratic voters. In 1986 Bob Starks, a White Republican, barely beat Nathaniel Edmond, a Black Democrat in the general election. Stark won despite the fact that Democrats out-registered Republicans in this district 21,202 to 9,968. Stark won by carrying nearly all the White votes in the district and Edmond had the support of almost all the black voters. However in 1988 Tom Easterly, a White Democrat, defeated Stark by the narrowest of margins 9,992 to 9,989. Easterly did not seek re-election in 1990; instead he decided to run for the state senate. This opened the door for Daryl Jones, a Black democrat, who won the 1990 election despite losing the White vote. Jones beat John Minchew 64 to

36 percent because more Blacks turn out at the polls, and he carried enough of the White vote (24 percent) to put him over the top. (See Table 14)

47. Blacks candidates have also fared poorly in seeking county-wide office. The two "preferred candidates" of Black voters were defeated in the 1990 election for County Commissioner by an Anglo-Hispanic coalition. Arthur Teele, a Black Republican, defeated Barbara Carey for the seat traditionally reserved for a Black on the County Commission. Carey campaigned as a strong advocate of Black interests and sought to distance herself from her previous image as a moderate ethnic political figure. This strategy backfired as she succeeded in losing support from non-Hispanic White voters and Hispanics. Carey was clearly the favorite of the Black community who gave her 85 percent of the vote, but Teele easily defeated her by carrying both the non-Hispanic White and Hispanic vote by large margins. In the race for the seat vacated by Barry Schrieber, Mary Collins defeated Betty Ferguson in another ethnically polarized vote. Ferguson was the preferred candidate of Black voters (96.6 percent) but was rejected strongly by Hispanics (19.4 percent) and by non-Hispanic Whites (14.1 percent).

46. The poor showing by Black and Hispanic candidates in county races illustrates the point that, given the polarized nature of Dade County politics, the only way a minority candidate can be elected is in a majority minority district. Besides some token minority representation on the County Commission and the School Board and the exception victory of Daryl Jones in House district 118, all other political gains by Hispanics and Blacks have come in majority minority districts. Thus, non-Hispanic Whites have taken advantage of tripartite politics and their control over the media and business establishment to maintain their control over the political system. This is reflected in their over-representation in the Dade delegation to Tallahassee and Washington.

IV. REAPPORTIONMENT

A. Current Districts

49. Minority communities have been handicapped in electing their "preferred candidates" by the current districting scheme. The current apportionment of Legislative and Congressional districts has diluted the voting strength of both Hispanics and Blacks. Despite a decade of tremendous population growth in the Hispanic community, no new seats have been gained by Hispanics to the state House since 1984. Moreover, the recent gains in the state Senate (34th District, 1986; 40th District, 1988) and in Congress (1989), with one exception (the 33rd Senate District, 1988) came only after very polarized ethnic elections. Blacks have fared even worse. From 1982-1990 Black representation in Tallahassee has remained constant at three state House seats (106, 107, 108) and one state Senate seat (36), all in heavily Black districts. Only the 1990 victory of Daryl Jones in the 118th district has broken this pattern of Black frustration. Meanwhile, non-Hispanic Whites have retained the lion's share of Dade county political power controlling, with only 32 percent of the population, ten out of the twenty state House seats and three out of the seven state Senate seats. Thus, non-Latin Whites have maintained their control of the Dade delegation in Tallahassee despite significant population gains by both Hispanics and Blacks. (See Table 15)

50. Two majority Hispanic state Senate seats were created (33rd and 34th), but with heavy Hispanic population growth the 40th district also became a majority Hispanic district, going from 40% Hispanic in the 1980 census to nearly 60 percent Hispanic in the 1990 census. (See Table 15) The 40th District elected its first Hispanic in 1988. The 35th state senate district, while still held by a non-Hispanic White, also became a majority Hispanic district during the last ten years going from 39

percent to 54 percent Hispanic. The growth in the Hispanic population in these districts reflects the Hispanic population explosion in West Kendall, Kendall Lakes, West Dade and the South Beach areas. Thus, the Hispanic population was not greatly diluted in the State Senate districts; in fact, less than 17 percent of the entire Hispanic population of Dade reside in the three other current Dade state senate districts. However, Blacks have not fared as well as Hispanics in the state Senate. The 36th District is the only majority Black state Senate district in Dade, while both the current 33rd and 39th district contain large numbers of Blacks. Moreover, the large number of Blacks (73.14) in the 36th District raises the question of packing.

B. Senate Joint Resolution 2-G

51. On April 14, 1992, the Florida Legislature passed a new plan for the apportionment of the Florida Senate and the Florida House of Representatives. Both of these plans fail to create the maximum number of majority minority districts. In fact, the plans, instead of maximizing minority representation, seem designed to protect powerful non-Hispanic White incumbents. Moreover, the legislative plan is designed to elect non-Hispanic Whites by exploiting ethnic tensions and polarized voting patterns in Dade.

52. The plan for the apportionment of the state Senate seems specifically designed to dilute Hispanic voting strength. SJR-2G did leave in place the three super majority Hispanic districts and the one majority Black district in Dade. But, it divided the large numbers of Hispanics (133,643) who lived in the old 35th district. Hispanics comprised, according to 1990 census, almost 55 percent of the Voting Age population of the district. The total number of Hispanics in the successor district (38th state Senatorial district) was reduced to 99,908 even though the district actually increased in population

from 244,914 to 316,872 as large sections of the old 37th state Senate district were added to the old 35th district. (See Table 16) Most of the Hispanics were placed in the new 40th (the old 39th) state Senatorial district (which includes all of Monroe County) increasing the Latin population of that district from 50,541 to 74,666; others were put into the heavily Hispanic 34th district, and a section of Hialeah and Little Havana were then taken from the 34th district and the 33th district (the new 39th) and put in the predominately Black 36th district. The Hispanic population of the 36th district increased by over 40,000 to 97,477. The result of this redistricting is that 28.55 percent of the Hispanic population of Dade will reside in state senate districts (36, 38, 40) that Hispanics will have absolutely no possibility of winning. (See Table 16)

53. The Legislature attempted to justify the fracturing of the Hispanic vote by maintaining that it was the only way to create a Black influence district. The Black influence district created by the Legislature does not in fact offer Blacks the opportunity to elect candidates of their choice. A corridor of the proposed 40th District cuts through the heavily Hispanic sections of the city of Miami (parts of census track 26, 66.01 and 66.02) to connect with a Black section of the city (18.01, 18.02, 18.03, 20.03, 20.4, 22.01, 23, 25, 29, 30.1, 34, 36.01) creating a salient of the 40th District in the Liberty City area. The new district connected the Black pockets of Southern Dade county with Liberty City. The old 36th senatorial district contributed about 60,000 Blacks to the Liberty City salient and made up the population, as noted above, by adding some heavily Hispanics census tracts in Hialeah and Little Havana areas to the still predominately Black 36th district. However, while the Black population of the 40th (the old 39th) district will increase from 41,303 to 119,854, Blacks will only comprise 32.86 percent of the district's voting age population. Non-Hispanic Whites will still be the largest group with over 42 percent of the voting age population. The tradition of polarized ethnic voting, with Hispanics joining with Anglos to defeat Black candidates, will probably result in the election of a non-Hispanic White state senator from the 40th district. (See Table 17) Moreover, the Legislative plan dramatically reduces the number of Black Voting Age population in the old 36th Senatorial district from 73.19 to 49.68 percent while the Hispanic VAP climbs from 26.09 to 33.13 percent. While the seat will probably remain safe for incumbent Carrie Meek, it could create problems in the future for other Black candidates, especially given the history of polarized voting in Dade.

54. The new proposed state Senate districts severely dilute the Hispanic vote and fail to create a new majority Black district. Moreover, both the new 38th and 40th district will be much more Democratic, as the 38th loses 35,000 mostly Republican Hispanics and the 40th gains 70,000 mostly Democratic Blacks. The Senate apportionment of SJR-2G fails to treat minorities fairly. However, it does guarantee the election of two non-Hispanic White Democrats in the 38th and 40th state Senate districts at the expense of Hispanics and Blacks. Racially polarized voting in Dade will prevent the election of Black and Hispanic candidates in these senate districts. The negative effects that polarized voting has on minority candidates was illustrated in the 1990 election when Javier Souto was barely re-elected to the State Senate from the 40th district. In that election, Tom Easterly won 74 percent of the non-Hispanic White vote and 92 percent of the Black vote. Souto was able to squeak by his Anglo opponent (36,066 to 33,955) by winning over 80 percent of the Hispanic vote.

55. In summary, SJR-2G dilutes minority voting strength and will leave non-Hispanic Whites over-represented at Tallahassee. As the reapportionment per SJR-

2G dilutes both Black and Hispanic votes and fails to maximize the representation of said groups it violates the Voting Rights Act.

C. Reaves/Brown: An Alternative not Chosen

56. In sharp contrast to SJR-2G, the Reaves/Brown plan, which was introduced and voted down in the legislature, would have maximized the voting strength of minority groups. It increases the number of majority Hispanic state Senate districts from three to four and maintains a super majority for Black voters in the 36th Senatorial district. The plan also maximizes minority influence in the State House. Instead of creating just nine Hispanic majority districts in Dade (as per SJR-2G), it creates eleven. Blacks also gain with this plan for instead of just three strong and one weak Black majority district (as per SJR-2G), the plan creates four strong Black majority district and a very strong Black influence district.

57. The plan avoids the dilution of Hispanic voting power that plagues the SJR-2G reapportionment of the Florida Senate. The plan, instead of dividing Hispanic voters between the old 35th and 39th districts, concentrates these Latin voters in a more Hispanic 35th district. The Latin voting age population of the district would increase from the current 54.56 to 65.65 percent. The Reaves/Brown plan assures this level of Hispanic voters. The 36th district would retain its super majority of Black voters (59.75). This compares favorably with SJR-2G which reduces the Black voting age population in the 36th district to 49.68.

58. The Brown/Reaves plan for the apportionment of the Florida Senate and House maximizes the influence of both Hispanics and Blacks in electing candidates of their choice. The plan, by creating new majority minority districts in both the Florida Senate and the House, is clearly within the provisions of the Voting Rights Act.

D. The DeGrandy Plan (Plan 275)

59. The DeGrandy plan also maximizes the number of minority majority seats in South Florida but uses a different technique than Reaves/Brown. It retains the three super majority Hispanic state Senate districts and maintains one majority Hispanic district (55 percent) while creating two majority Black districts, one entirely within Dade (36) and the other (32) including Black populations in Broward. (See Table 18) The plan voids the dilution of Hispanic and Black voting power that plagues SJR-2G apportionment of the Florida Senate. The plan, instead of dividing Hispanic voters between the old 35th and 39th districts, maintains a Latin Majority in the 35th district. The Hispanic voting age population of this district would remain at about 55 percent. (See Table 18) However, while Reaves/Brown places all the Hispanic Senate districts within Dade, the DeGrandy Plan, in order to accommodate a second Black district, is forced to place part of the 33rd district in Broward.

60. The DeGrandy plan maximizes Black representation by creating two majority Black Districts. The 36th district would retain its majority of Black voters without packing (57.3). This compares favorably with SJR-2G which reduces the Black voting age population in the 36th district to 49.68. The proposed 46th district stretches from the large Black communities of North Dade through a thin corridor around U.S. 1 and picks up pockets of Black voters in South Dade (Coconut Grove, Richmond Heights, Perrine) all the way down to Florida City. The DeGrandy plan also recognizes the community of interest between the Black population in North Dade and Broward county by creating the 32nd district which joins the Black neighborhoods of Ft. Lauderdale, Dania, Hollywood, and Pembroke Park with Opa Locka, and North Dade. The DeGrandy plan goes far beyond either

SJR-2G or even the Reaves/Brown in empowering the Black communities of South Florida.

61. The DeGrandy plan for the apportionment of the Florida Senate and House maximizes the influence of both Hispanics and Blacks in electing candidates of their choice. The plan by creating new majority minority districts in both the Florida Senate and the House is clearly within the provisions of the Voting Rights Act.

I have personal knowledge of the matters set forth below.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Dario V. Moreno
DARIO V. MORENO

(Notarization Omitted in Printing)

DECLARATION OF ALLAN J. LICHTMAN

(Plaintiffs' U.S. Exhibit #46)

1. I am a professor of history and formerly Associate Dean of the College of Arts and Sciences at The American University in Washington, D.C. I received my PhD in history from Harvard University in 1973, with a specialty in political history and the quantitative analysis of historical data. I am the author of five books and numerous scholarly articles that cover topics such as statistical procedures for analyzing political information, electoral history and prediction, and the social scientific analysis of voting rights issues. My publications have appeared in scholarly journals such as *Proceedings of the National Academy of Sciences, Journal of Interdisciplinary History, Political Methodology, Journal of Law and Politics, and The American Historical Review*. I have been a consultant or expert witness for plaintiffs and defendants in more than 50 voting rights cases.

2. I have been asked by the Department of Justice to review documents prepared by the state of Florida defendants and their experts or consultants. My purpose is to use the information contained therein to provide analyses of the following issues in Dade County: a) racially polarized voting, including minority political cohesion and white crossover voting; and b) the opportunities for minority voters to elect representatives of their choice in particular House and Senate districts. Given that the issues in Dade County focus on the creation of additional Hispanic districts, the polarization analysis will focus on Hispanics. But the analysis will also consider the viability of black districts created as part of plans that expand the number of Hispanic-majority districts in Dade County.

3. Documents prepared by the state of Florida and their experts and consultants include considerable information of the kind usually relied upon by social scientists for analyses of voting rights issues. This data includes

ecological regression, extreme case analysis, and the results of elections recompiled to cover the precincts within particular House and Senate districts. My examination of the reports, which include methodological discussion, indicate that these procedures were appropriately applied to electoral data in Dade County.

4. For purposes of this analysis, racially polarized voting is defined as the extent to which members of distinct racial or ethnic groups support different candidates of their choice. Polarized voting can be partitioned into two parts. Minority cohesion is the extent to which minority voters support candidates of their choice. White bloc voting is the extent to which whites support different candidates. Racially polarized voting is politically significant if, under a given electoral system, it impedes the opportunities for minority voters to elect candidates of their choice.

5. Reports prepared by expert consultants for the State of Florida present ecological regression and extreme case analyses of 13 elections in which Hispanic candidates competed against non-Hispanics for State Senate or State House positions. This represents a sufficient base of data from which to draw conclusions about polarized voting, cohesion, and bloc voting in state legislative elections. The results of the experts' state legislative analyses are reported in Table 1. In addition, the experts also provided some analyses of other types of elections held in Dade County. For completeness, these results are reported in Table 2.

6. The results reported in Table 1 show a clear pattern of racially polarized voting, Hispanic cohesion, and white bloc voting. It also shows that black voters united with white voters in opposition to Hispanic candidates for Senate and House positions. In every election studied, Hispanics voted for Hispanic candidates in greater proportion than either whites or blacks. The results reported in Table 1 show a pattern of strong political cohesion.

By generally overwhelming majorities, Hispanic voters preferred to elect Hispanic candidates to state legislative positions. In 11 of 13 elections for the Senate or House, ecological regression results show that more than 75 percent of Hispanic voters opted for the Hispanic candidates. The only exceptions were one three-way primary (State House District 114, 1990) and one nearly uncontested primary (State Senate District 40, 1986). On average, for all 13 elections, the mean Hispanic vote for Hispanic candidates was 79 percent, whereas the mean Hispanic vote for non-Hispanic candidates was 21 percent.

7. The results presented in Table 1 likewise show a pattern of strong bloc voting by whites for non-Hispanic candidates. In 11 of the 12 elections for which data on whites is presented, a majority of whites voted for non-Hispanic candidates. In 10 of the 12 elections the white majority for non-Hispanic candidates was two-thirds or more. On average, for all 12 elections, the mean white vote for non-Hispanic candidates was 76 percent, compared to a mean white vote of 24 percent for Hispanic candidates.

8. Results for legislative elections, reported in Table 1, also indicate that blacks joined with whites in opposing Hispanic Senate and House candidates. Table 1 shows that the consultants were able to derive just one ecological regression estimate of black voting behavior for a general election with an Hispanic candidate (State House 105, 1990). The Table shows a black vote for the Hispanic candidate of 16.1. The consultants also derived one ecological regression estimate for a Republican primary (State House District 118, 1986). It shows a black vote for the Hispanic candidate of 7.8 percent. In addition, the consultants presented two extreme case results for black voting in general elections (State Senate District 40, 1990 and 1986) with an Hispanic candidate. These results show that in 1990 3.7 percent of the vote in predominantly black precincts was cast for the Hispanic candidate and in 1986, 2.6 percent of the vote in pre-

dominantly black precincts was cast for the Hispanic candidate. Finally, the analysis includes one extreme case estimate for a Republican primary (State Senate District 40, 1986). In this election, 10.0 percent of the vote in predominantly black precincts was cast for the Hispanic candidate. Thus the estimates of black voting show less than a 20% black vote for Hispanic candidates.

9. These findings of Hispanic cohesion and white bloc voting are supported by the analyses of additional local elections in Dade County included in the reports prepared by consultants for the State. In 7 of the 10 elections for local offices in Dade County, a majority of Hispanic voters opted for the Hispanic candidate. In 8 of 10 elections, a majority of white voters voted for non-Hispanic candidates. Again, blacks generally united with white voters in opposition to Hispanic candidates. In 7 of the 9 elections for which ecological regression results are reported, a majority of black voters supported non-Hispanic candidates.

10. The high degree of racially polarized voting documented for legislative elections in Dade County indicates that Hispanic voters would have an opportunity to elect candidates of their choice only in Districts with Hispanic voting-age majorities. Otherwise white bolc voting would usually be sufficient to defeat the candidate of choice of Hispanic voters. This finding is supported by the actual results of Dade County elections. No Hispanic has been elected to a legislative position in a white-majority district. In contrast, Hispanics have uniformly been elected to office in districts with a 59 percent or greater Hispanic majority.

11. Reports prepared by consultants for the State tacitly recognize both that strong polarization exists between Hispanics and non-Hispanics in Dade County and that such polarization impedes opportunities for Hispanics to elect cadidates of their choice. Consultants did not find that any legislative district in Dade County was an effective Hispanic district (either "competitive" or "safe" for Hispanics) unless it included a substantial Hispanic voting-age majority.

12. As compared to the state's plan, the Reaves/Brown/Hargrett plan for the Senate creates an additional district in Dade County (District 40) with a substantial Hispanic voting-age majority (62.1 percent). The evidence indicates that although such a district would not provide Hispanics a guarantee to elect a Senator of their choice it does provide Hispanics a realistic potential to elect such a Senator.

13. As indicated above, Hispanic candidates of choice have prevailed in every legislative district in Dade County with a 59 percent or greater Hispanic majority. In addition, the baseline votes used by consultants for the state clearly indicate that Hispanics would have a realistic chance to elect a Senator of their choice in District 40. The baseline chosen by the consultants to test the viability of Hispanic districts was the vote for gubernatorial candidate Martinez in the 1986 and 1990 gubernatorial election. This is a very conservative choice for Hispanic districts, because the estimated Hispanic vote for Martinez (59% in 1990) is about 20 percentage points below the estimated mean Hispanic vote for state legislative candidates (which is not fully compensated for by a corresponding increase for the Martinez contest in white crossover voting). Nonetheless, the results of analysis reported in Table 3 show a mean vote of 55 percent for Martinez in Senate District 40 under the Reaves plan. As Table 3 shows, this result for Reaves District 40 is not substantially different from the mean of 56.3 percent for Martinez in the state's plan District 37, a district that the state has certified as including "three effective districts in which persons of Hispanic origin can elect candidates of choice (District 34, 26, and 38). These supermajority districts respect the cohesive Hispanic communities in Dade County." (The Florida Senate, Committee on Re-

apportionment, letter to Steven Mulroy, June 8, 1992, p. 3: it should also be noted that this statement supports the finding of this study that Hispanics in Dade County are politically cohesive).

14. The Reaves/Brown/Hargrett plan provides additional opportunities for Hispanic voters without sacrificing opportunities for black voters in Dade County. Again, use of the state's baseline shows that both Dade County Senate districts in the Reaves/Brown/Hargrett plan provide black voters a realistic potential to elect candidates of their choice. In district 32, Jesse Jackson received 70.2 percent of the 1988 primary vote, Alcee Hastings received 72.4% of the primary vote and 83.5% of the runoff vote, and Shaw received a "yes" vote of 74.3 percent. In district 36, Jackson received 79.3 percent, Hastings 77 percent and 86.4 percent, and Shaw 74.7 percent.

15. As compared to the state's plan for the House districts in Dade County, Table 4 indicates that the DeGrandy plan creates an additional two Hispanic districts. All districts under the DeGrandy plan contain an Hispanic voting age population of at least 64.5 percent, whereas Hispanic districts under the State plan dip down to 63.0 percent. The mean vote for Martinez is the DeGrandy districts is at least 50.9 percent, a shade above the state plan's minimum of 50.6. Given the substantial Hispanic voting age population in the DeGrandy plan and the consistent Martinez vote above the minimum 50.6 percent in the state's districts, the evidence indicates that the DeGrandy districts provide minorities realistic opportunities to elect candidates of their choice.

16. The report by consultants to the state indicate that all the Degrandy districts are "effective" minority districts, although most are regarded as falling into the "competitive" rather than the safe category (Attachment 1). But this subjective categorization lacks both conceptual foundation and proper application to House districts. Consultants' report states that "A Hispanic house

district was considered safe if it was at least 67% Hispanic in total population and if the Hispanic-preferred candidate won both of the elections examined" (Florida House of Representatives, June 4, 1992, letter to John Dunne: attached report of Election Data Services by Dr. Lisa Handley June 2, 1992, p. 4 of EDS report). The report provides no basis for selecting the arbitrary 67% cutoff or the 50% cutoff in the Martinez contests. Moreover, by EDS' own explicitly stated criteria, only 6 of the Hispanic districts in Dade County in the state plan should be regarded as "safe." Districts 102, 107, and 115 have less than a 67 percent Hispanic population. Yet the report counts 8 districts in the state's plan as safe, including 102 and 115 (Attachment 2). For other districts, the classification rests on paper-thin distinctions. In district 113, for example Martinez received 51.3 percent of the vote in 1990 and in district 117 he received 52.0 percent.

17. The DeGrandy plan achieves additional opportunities for Hispanics in these elections without sacrificing opportunities for blacks in Dade County. The DeGrandy plan creates 4 black House districts in Dade County with non-Hispanic black voting age populations of 54.6 percent or more. Even by the state's criteria, these are all classified as "safe" seats for black voters. The state plan includes 4 black districts in Dade County with non-Hispanic black voting age populations of 51.0 percent or more. The state's consultants likewise regard these as "safe" districts.

Pursuant to 28 U.S.C. 1746, I declare, under penalty of perjury, that the foregoing is true and accurate.

/s/ Allan J. Lichtman
ALLAN J. LICHTMAN

6/27/92 1:30 AM

AFFIDAVIT OF LISA R. HANDLEY

(Defendants' House Exhibit #19)

STATE OF FLORIDA)
COUNTY OF LEON)

I, Lisa R. Handley, the undersigned being first duly sworn upon oath, do hereby depose and state as follows:

1. I am the Senior Research Analyst at Election Data Services, Inc., a Washington-based consulting firm that specializes in redistricting. I have a Ph.D. in political science from George Washington University and have taught classes in American government, methodology, and voting rights. I have published numerous articles on the subject of minority voting rights and have a book due to be released in August 1992 with Cambridge University Press entitled *The Quest for Minority Voting Equality: A Social Science Perspective*, co-authored with Dr. Bernard Grofman and Dr. Richard Niemi. I have served as a consultant or expert witness in more than a dozen voting rights cases, including *DeGrandy v. Wetherell*.

2. Election Data Services, Inc. was retained by the Florida House of Representatives in 1989 to provide consulting services for the House during the redistricting process. The two major tasks that I have been asked to undertake in this regard have been: 1) a racial bloc voting analysis and a written report outlining my findings ("Voting Rights Act and Redistricting in Florida," January 21, 1992, Draft); and 2) an analysis of the effectiveness of proposed minority districts in the various congressional and legislative plans put forward as well as written reports on the subject both for the earlier congressional case and for the Department of Justice.

3. The racial bloc voting draft report that I prepared has been used by both plaintiff and defendant experts in this proceeding. In the analysis underlying the report I

utilized two standard statistical methods, bivariate ecological regression analysis and homogeneous precinct analysis, to examine all statewide, congressional and state legislative contests since 1986 in the state of Florida that have included a minority candidate. I also looked at a few local contests in six major urban counties in Florida: Dade, Broward, Duval, Hillsborough, Orange, and Pinellas. This analysis allowed me to make estimates of voting patterns and participation rates by race and ethnicity in several areas of Florida.

4. On the basis of this analysis I determined that voting generally tended to be polarized in Florida and that minorities tended to participate at lower rates than whites but that both of these circumstances varied a great deal by district. Accordingly, a jurisdiction-specific analysis must be done in order to reach any conclusions about a given area or district.

5. Because there have been no congressional or state legislative contests that have included minority candidates in the area of Escambia County—and because this is not one of the several major urban areas with a large concentration of minorities that I was asked to examine in more detail—no racial bloc voting analysis was done for Escambia County. For this reason I can offer no conclusions about the existence of racially polarized voting in Escambia County.

6. I was able to reach some general conclusions about racially polarized voting and participation rates with regard to Dade County. I found that voting tended to be racially polarized because whites tended voted for white candidates and not for black or Hispanic candidates, Hispanics tended to vote for Hispanic candidates and not white or black candidates, and blacks tended to vote for black candidates, and not Hispanic or white candidates. Furthermore, blacks in Dade County tended to vote very cohesively, and Hispanics as a whole also voted cohe-

sively. I was also able to establish that minority participation rates, particularly Hispanic participation rates, were much lower than white participation rates in Dade County.

7. These findings have specific implications for drawing minority districts in Dade County. The fact that minorities tend to vote at lower rates than whites indicates that districts with voting age population in excess of 50 percent are necessary for blacks to elect candidates of their choice and that districts far greater than 50 percent Hispanic voting age population are necessary if Hispanics are going to be able to elect candidates of their choice in Dade County. The degree to which these districts must exceed 50 percent minority voting age population varies by district. In fact, a district-specific analysis is necessary to determine if a district is going to be an effective minority district or not.

8. An effective minority district is a district that gives minorities an opportunity to elect candidates of their choice. As Dr. Lichtman pointed out in his testimony before the court on June 27 in *DeGrandy v. Wetherell* with regard to the Dade County Commission districts, there are different degrees of effectiveness—there are "safe," or what he also referred to as "rock solid," districts—that is, districts that are almost certain to elect minority-preferred candidates, and there are districts that give minorities an "equal opportunity to elect candidates of choice" or what I—as well as other political scientists—have referred to as "competitive" districts. I have made this distinction with regard to safe versus competitive minority districts in some of my previously published work (see, for example, Kimball Brace, Bernard Grofman, Lisa Handley and Richard Niemi, "The 65 Percent Rule in Theory and Practice," *Law and Policy*, Vol. 10 (1), January 1988, pp. 43-62). This distinction recognizes the fact that not all "effective" or "viable" districts are equally likely to elect minority-preferred candidates: "safe" districts are more likely to elect a minority-preferred candidate than "competitive" districts.

9. The standard I employed to determine if a district was safe, competitive, or not effective was based on a very thorough analysis I conducted for each proposed district with a minority voting age population greater than 30 percent. This analysis was actually twofold. Because of my extensive experience analyzing proposed minority districts in the state of Florida, I was able to determine that inevitably, if a district was over 67 percent Hispanic in voting age population or over 57 percent black in voting age population, and recompiled election returns indicated that the minority-preferred candidate would have won all of the elections in that district (that is, got 50% or more of the vote in a two-candiate election or received a plurality of the vote in an election with more than two candidates), that district was a "safe" district. I therefore classified it as such and did no further analysis on the district. (This was done, in part, to save time given the large number of districts to analyze in a short span of time.) This does not mean, however, that no other districts other than these districts were considered safe. It merely means that no analysis other than examining recompiled election returns was necessary for these particular districts to be classified as safe.

10. The second step of the analysis included examining all of the remaining minority districts with regard to the following: 1) the black or Hispanic voting age population of the district, 2) the partisan make-up of the district, 3) the degree of minority cohesiveness and white crossover vote to be expected in the district, 3) the relative turnout rates of whites, blacks and Hispanics in the district, 4) recompiled election returns to determine if black or Hispanic statewide candidates that had run previously would have carried the district and 5) whether there was a minority incumbent in the district or not. If a district had less than 57 percent black voting age population, or

67 percent Hispanic voting age population, but recompiled election returns indicated that the minority-preferred candidates would have won all of the contests considered, turnout rates indicated that minority voters would comprise a majority of the voters on election day, and minority voters were cohesive, then this district was classified as safe. If a district met some of these criteria, but not all, then the district was classified as "competitive." If a district met none of the criteria, it was classified as "not effective" at all.

11. This analysis permitted me to compare the number of effective minority districts created in Dade County by each of the plans before this court. There are 12 safe minority districts in SJR 2-G—4 safe black seats and 8 safe Hispanic seats. The DeGrandy Plan has 7 safe minority seats in Dade County—4 safe black seats and 3 safe Hispanic seats. The Reaves, Brown, Hargrett Plan also has 7 safe minority seats in Dade County—5 safe black seats and only 2 safe Hispanic seats. No plan before this court creates a safe—or even a competitive—district in the Escambia County area.

12. Although it is true that both the DeGrandy Plan and the Reaves, Brown, Hargrett Plan create more competitive seats in Dade County than the plan passed by the state legislature, they do so at the expense of creating safe minority seats. Both of these plans have created districts that may elect minority-preferred candidates, but may not—the margins are cut very thin. The only thing that is virtually certain is that both plans have created more districts that will elect Republicans to office.

FURTHER AFFIANT SAYETH NOT.

/s/ Lisa R. Handley
LISA R. HANDLEY

(Notarization Omitted in Printing)

DECLARATION OF ALLAN J. LICHTMAN

(Plaintiffs' U.S. Exhibit #54)

I, Allan J. Lichtman, state the following:

1. I have previously submitted a declaration and testified in this case. I have been asked by the U.S. Department of Justice to analyze new information presented by the state on a) turnout data that may affect opportunities for Hispanics to elect candiates of their choice in various Hispanic districts in Dade County and b) estimates of the Hispanic citizen voting age population in these districts.

2. With respect to opportunities for Hispanic voters in Dade County districts, defendants have presented an analysis purporting to show district-specific turnout rates for State Senate districts. The state's data, taken from statewide general elections, may not accurately reflect turnout in Hispanic v. non-Hispanic state legislative elections. However, taking the state's estimates at face value, when combined with typical Hispanic cohesion and white crossover rates,[1] they show that Hispanics would have a realistic potential to elect legislative candidates of their choice in all 4 districts within the Reaves/Brown/Hargrett plan as well as all 3 districts within the state's plan. It is important to match the general election turnout presented by defendants with general election measures of Hispanic cohesion and non-Hispanic crossover.

[1] To keep the projections for the Hispanic candidates of choice conservative, I eliminated from the mean crossover rate the one election in which a majority of whites (62.6) voted for the Hispanic candidate of choice. Inclusion of this election would have raised the crossover rate from 28.5 percent to 32.3 percent and increased the projection of the vote for Hispanic candidates. Given the lack of significant black proportions in Hispanic districts and the lack of complete measurements in the state's data for black voting, the analysis for this declaration relies on estimates of white votes for the Hispanic candidate of choice (in every instance, the Hispanic candidate).

Measures of cohesion and crossover will be excerpted from Table 1 of my original declaration (that included both general elections and Republican primaries). The methodology used to project votes for candidates of choice of Hispanics is identical to the methodology I utilized as expert for the Department of Justice in *Garza v. Los Angeles County*. Results for the State's plan and the Reaves/Brown/Hargrett Plan are presented in Table 1 of this declaration.

3. The results reported in Table 1 corroborate the analysis presented in the earlier declaration. The projected vote for the Hispanic candidate of choice is at least several percentage points above 50 percent in all three districts in the state's plan and in three districts in the Reaves/Brown/Hargrett plan. In an additional district in the Reaves/Brown/Hargrett plan the projected vote for the Hispanic candidate of choice is just above 50 percent for the 1988 turnout and just below 50 percent for the 1990 turnout. Thus, compared to the state's plan there is one additional district in the Reaves/Brown/Hargrett which provides Hispanics a realistic potential to elect candidates of their choice.

4. I have also been asked to examine estimates presented by experts for the defendants on the percentage of citizen voting-age Hispanics in districts within the state's plan and the Reaves/Brown/Hargrett plan. These estimates are based on a regression analysis of the percentage of voting age citizens in block groups within Dade County and the corresponding percentages of Hispanics and of Cubans. The results of this analysis are not sufficiently reliable, however, to draw conclusions about the Hispanic citizenship percentage of any district within Dade County. The results appear to understate substantially the Hispanic citizenship percentage of Dade County districts.

5. The analysis presented in Table 2 uses the actual number of citizens in Dade County, supplied to me by

the Department of Justice from the 1990 Census. As this analysis demonstrates, estimates presented by experts for defendants understate by more than 80,000 persons the number of voting age citizens in Dade County. A prorated estimate of the number of missed Hispanic citizens equals 65,878. The addition of these missed Hispanic citizens increases the estimated Hispanic citizenship rate by nearly one-quarter, from 38.1% to 47.0%. The influence of the missed Hispanic citizens on Cuban versus non-Cuban citizenship rates cannot be determined.

6. One source of the unreliability of the analysis presented by experts for defendants is a highly questionable means of performing the ecological regression analysis used to estimate citizenship rates. One hallmark of ecological regression analysis is that both the "dependent variable" and the "independent variable" be measured on a common base: that is the percentages have the same denominator.[2] In this case, the dependent variable, the percentage of citizens in a Census bloc is measured as a percentage of voting age population. This means that the independent variables should be likewise be measured as percentages of voting age population. The proper procedure for estimating the percentage of non-Cuban and Cuban Hispanics who are citizens would be to regress the percentage of the voting-age population who were citizens in each census block on the percentage of non-Cuban Hispanics among voting age persons in each block and the percentage of Cuban Hispanics among voting age persons in each block. In this way the Hispanic population is separated without overlap in the equation. As indicated in Attachment 1, however, the citizenship analysis presented to this court includes as its independent vari-

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[2] "Ecological regression requires that the ratios which comprise independent and dependent variables use the same denominator; 'ordinary' regression does not." James W. Loewen and Bernard Grofman, "Recent Developments in Methods Used in Vote Dilution Litigation," *The Urban Lawyer* 21 (1989), p. 592-93.

ables, "% Hispanic of persons" and "% Cuban of Hispanic persons." The two independent variables in this analysis do not have common denominators. The % Hispanic of persons is measured as a percentage of the voting age population, but % Cuban of Hispanic persons is measured as a percentage of the Hispanic voting-age population. Thus the analysis does not cleanly separate the Hispanic voting age population and could produce erroneous estimates of citizenship rates. Without the opportunity to examine results of an analysis presented in standard form I would have serious questions about the reliability of the analysis performed by defendants' experts.

7. Table 3 applies the re-estimated Hispanic citizenship rate of 47.0 percent to districts within the state's plan and the Reaves/Brown/Hargrett plan. This is only a rough estimate of the percent of Hispanic voting age citizens in each district, but it does show results quite different from those presented by expert for defendants. In two of three districts in the state's plan, the estimated percentage of Hispanics among citizens is above 50 percent; in one district the estimated percentage is just below 50 percent. In three of four districts in the R/B/H plan, the estimated percentage of Hispanics among citizens is above 50 percent; in one district the estimated percentage is just below 50 percent.

Pursuant to 28 U.S.C. 1746, I declare, under penalty of perjury, that the foregoing is true and correct.

/s/ Allan J. Lichtman
ALLAN J. LICHTMAN
6/30/92

TABLE 1

PROJECTED VOTE FOR CANDIDATE OF CHOICE OF HISPANICS GENERAL ELECTIONS, TURNOUT ESTIMATES PRESENTED BY DEFENDANTS COHESION AND CROSSOVER DATA FROM 10 GENERAL ELECTIONS 1986-1990, HISPANIC V. NON-HISPANIC CONTESTS *

Hispanic Cohesion Rate=87.2% . Non-Hisp. Crossover Rate=28.5

STATE PLAN

I. State Plan: District 39

1988: Percent Hispanic Voters=59.6%

1990: Percent Hispanic Voters=54.3%

1. 1988 Hisp Vote For Hisp Cand Of Choice= .872 * 59.6% =52.0%
2. 1988 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 40.4% =11.5%
3. 1988 Total Vote For Hisp Cand Of Choice= 52.0% + 11.5% =63.5%

1. 1990 Hisp Vote For Hisp Cand Of Choice= .872 * 54.3% =47.3%
2. 1990 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 45.7% =13.0%
3. 1990 Total Vote For Hisp Cand Of Choice= 47.3% + 13.0% =60.3%

II. State Plan: District 37

1988: Percent Hispanic Voters=49.2%

1990: Percent Hispanic Voters=46.6%

1. 1988 Hisp Vote For Hisp Cand Of Choice= .872 * 49.2% =42.9%
2. 1988 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 50.8% =14.5%
3. 1988 Total Vote For Hisp Cand Of Choice= 42.9% + 14.5% =57.4%

1. 1990 Hisp Vote For Hisp Cand Of Choice= .872 * 46.6% =40.6%
2. 1990 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 53.4% =15.2%
3. 1990 Total Vote For Hisp Cand Of Choice= 40.6% + 15.2% =55.8%

TABLE 1: CONTINUED

Hispanic Cohesion Rate=87.2% Non-Hisp. Crossover Rate=28.5

III. State Plan: District 34

1988: Percent Hispanic Voters=44.1%

1990: Percent Hispanic Voters=41.7%

1. 1988 Hisp Vote For Hisp Cand Of Choice= .872 * 44.1%=38.5%
2. 1988 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 55.9%=15.9%
3. 1988 Total Vote For Hisp Cand Of Choice= 38.5% + 15.9%=54.4%
1. 1990 Hisp Vote For Hisp Cand Of Choice= .872 * 41.7%=36.4%
2. 1990 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 53.4%=16.6%
3. 1990 Total Vote For Hisp Cand Of Choice= 36.4% + 16.6%=53.0%

REAVES/BROWN/HARGRETT PLAN

I. R/B/H Plan: District 34

1988: Percent Hispanic Voters=52.9%

1990: Percent Hispanic Voters=50.4%

1. 1988 Hisp Vote For Hisp Cand Of Choice= .872 * 52.9%=46.1%
2. 1988 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 47.1%=13.4%
3. 1988 Total Vote For Hisp Cand Of Choice= 46.1% +13.4%=59.5%
1. 1990 Hisp Vote For Hisp Cand Of Choice= .872 * 50.4%=43.9%
2. 1990 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 49.6%=14.1%
3. 1990 Total Vote For Hisp Cand Of Choice= 43.9% + 14.1%=58.0%

II. R/B/H Plan: District 33

1988: Percent Hispanic Voters=47.3%

1990: Percent Hispanic Voters=43.1%

1. 1988 Hisp Vote For Hisp Cand Of Choice= .872 * 47.3%=41.2%

2. 1988 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 52.9%=15.1%
3. 1988 Total For Hisp Cand Of Choice= 41.2% + 15.1%=56.3%
1. 1990 Hisp Vote For Hisp Cand Of Choice= .872 * 43.1%=37.6%
2. 1990 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 56.9%=16.2%
3. 1990 Total Vote For Hisp Cand Of Choice= 37.6% + 16.2%=53.8%

III. R/B/H Plan: District 40

1988: Percent Hispanic Voters=45.5%

1990: Percent Hispanic Voters=42.9%

1. 1988 Hisp Vote For Hisp Cand Of Choice= .872 * 45.5%=39.7%
2. 1988 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 54.5%=15.5%
3. 1988 Total Vote For Hisp Cand Of Choice= 39.7% + 15.5%=55.2%
1. 1990 Hisp Vote For Hisp Cand Of Choice= .872 * 42.9%=37.4%
2. 1990 Non-Hsp Vote For Hisp Cand of Choice= .285 * 57.1%=16.3%
3. 1990 Total Vote For Hisp Cand Of Choice= 37.4% + 16.3%=53.7%

III. R/B/H Plan: District 35

1988: Percent Hispanic Voters=37.8%

1990: Percent Hispanic Voters=34.8%

1. 1988 Hisp Vote For Hisp Cand Of Choice= .872 * 37.8%=33.0%
2. 1988 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 62.2%=17.7%
3. 1988 Total Vote For Hisp Cand Of Choice= 33.0% + 17.7%=50.7%
1. 1990 Hisp Vote For Hisp Cand Of Choice= .872 * 34.8%=30.3%
2. 1990 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 65.2%=18.6%
3. 1990 Total Vote For Hisp Cand Of Choice= 30.3% + 18.6%=48.9%

THE VOTING RIGHTS ACT AND REDISTRICTING IN FLORIDA

(Plaintiffs' U.S. Exhibit #47)

ELECTION
DATA [LOGO]
SERVICES INC.
1225 I Street, NW, Suite 700
Washington, DC 20005-3914

The Voting Rights Act (hereinafter "VRA"), 42 U.S.C. § 1973, is the primary statutory mechanism for enforcing the voting provisions of the Fourteenth and Fifteenth Amendments to the U.S. Constitution. The Act contains two significant provisions, § 2 and § 5, which effect the redistricting process.

Section 5 requires covered jurisdictions to "preclear" any change in their electoral laws, practices or procedures with the U.S. Department of Justice or the U.S. District Court for the District of Columbia before the change may be implemented. To obtain preclearance, a covered jurisdiction must establish that the voting change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group." Five minority groups are protected under Section 5: blacks, Hispanics, Asians, Native Americans and Aleutians.

Historically, the Department of Justice and federal courts have applied the same standards in reviewing submitting changes under Section 5. However, in 1987 the Department of Justice promulgated new guidelines for the administration of Section 5 which were a marked departure from the standard applied by the U.S. Supreme Court. *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. sec. 51.55.

The Department of Justice can object to state redistricting plans if: (1) there is evidence of discriminatory

intent; (2) the plan results in a retrogression from existing levels of minority voting strength; or (3) the plan clearly violates Section 2 of the Voting Rights Act. A determination by the Department of Justice that the submitted plan merits preclearance does not preclude a subsequent challenge under Section 2 of the Act.

Only five counties in Florida are covered by § 5: Collier, Hardee, Hendry, Hillsborough and Monroe Counties. However, the Justice Department may require the state to submit its statewide redistricting plans for preclearance.

In contrast to the limited coverage of § 5, § 2 of the Act can be used to challenge "any voting qualification or prerequisite to voting or standard, practice or procedure anywhere in the United States." In 1982, Congress amended § 2 of the VRA, eliminating the intent requirement introduced by the Supreme Court in *Mobile v. Bolden*, 446 U.S. 55 (1980), and instead establishing that a § 2 violation could be proven by showing that a challenged electoral practice had a discriminatory effect on minority voters.

The Supreme Court was presented with its first opportunity to interpret amended § 2 in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In discussing the plaintiffs' claim that the establishment of five multimember districts in the redistricting plan for the North Carolina State House of Representatives impaired black citizens' ability to elect representatives of their choice, a majority of the Court determined that plaintiffs must establish three threshold factors:

> 1. the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district;
>
> 2. the minority group must be able to show that it is politically cohesive;

3. the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.

The lower courts have subsequently applied the three part test outlined in *Gingles* to all challenges brought under § 2, including challenges to single member districts. The *Gingles* factors are a necessary threshold but are usually not sufficient, in and of themselves, to prove a violation. If the three factors are satisfied the courts will review the totality of the circumstances to determine the existence of a voting rights violation. However, the failure to meet a single *Gingles* factor is usually fatal to a vote dilution claim.

In *Gingles*, the Supreme Court made it clear that the evidentiary "linchpin" of a majority vote dilution claim is racially polarized voting. The Court identified racial bloc voting as the foundation of two of the three elements of the results test; one, a racial bloc voting analysis is needed to determine whether the minority group is politically cohesive; and two, the analysis is required to determine if whites are voting sufficiently as a bloc to usually defeat minority-preferred candidates. If these two conditions are present, and if the minority group is sufficiently large and compact to constitute a majority of a single member district, then districts must be drawn to permit minority voters the opportunity to elect candidates of their choice.

In *Gingels*, the Court held that racially polarized voting exists when there is "a consistent relationship between race of the voter and the way in which the voter votes," or expressed differently, when "black voters and white voters vote differently." Racially polarized voting will not result in a § 2 violation unless it denies to the minority community an opportunity to elect their preferred representatives. Therefore, a racial bloc voting analysis en-

tails comparing the voting patterns of whites and minorities and determining the electoral success of the minority-preferred candidate (legally significant racial polarization exists is voting is polarized and the minority-preferred candidates are usually defeated).

In attempting to ascertain if legally significant racial polarization exists, no circuit with the exception of the Tenth Circuit (*Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989), has placed any evidentiary weight on the examination of an election without a viable minority candidate. *Collins v. City of Norfolk*, (4th Cir. 1989); *Campos v. City of Baytown*, (5th Cir. 1988); *Citizens for a Better Gretna v. City of Gretna, La.*, (5th Cir. 1987); *Gomez v. City of Watsonville*, (9th Cir. 1989); *Romero v. City of Pomona*, (9th Cir. 1989); *Solomon v. Liberty County, Fla.*, (11th Cir. 1990). In addition, the analysis accepted by the Supreme Court in *Gingles* did not contain any white-only election contests. For this reason, only election contests that included at least one minority candidate are examined in this study.

Estimating Voting Patterns by Race/Ethnicity

The two widely used, standard analytic procedures for estimating the extent to which minorities and whites have voted differently are homogeneous precinct analysis and bivariate ecological regression analysis. Homogeneous precinct analysis involves examining the voting patterns of precincts that are racially/ethnically homogeneous (or nearly so) and bivariate ecological regression involves a graphical comparison of the votes for candidates in each precinct with the racial/ethnic composition of that precinct.

The principal advantage of homogeneous princict analysis is its simplicity. It requires no sophisticated statistical analysis to produce estimates of a group's voting patterns; the behavior of voters of a given race/ethnicity is directly observable. The major drawback of this type

of analysis is that the entire racial/ethnic group is not considered when deriving an estimate of the group's voting behavior, only the behavior of those members of the group living in homogeneous precincts is analyzed. The principal advantage of bivariate ecological regression is that it makes use of information from all of the precincts, both those that are racially/ethnically homogeneous and those that are racially/ethnically mixed. Bivariate ecological regression is a far more complicated and time consuming procedure, however.

In *Gingles*, the Supreme Court indicated its acceptance of these two complementary estimation techniques. This study employs both of these statistical methods to produce estimates of the percentage of voter of each racial/ethnic group that voted for each of the candidates in the elections examined.

Creating Effective Minority Districts: The Mathematics of Voting Equality

The Voting Rights Act and litigation subsequent to its passage has clearly established the need for jurisdictions to create districts in which minorities will have the opportunity to elect representatives of their choice. The number of such districts, as well as the percentage minority population needed to create these "effective minority districts" varies depending on the locality. When creating minority districts, jurisdictions must be careful to avoid both the unnecessary fragmentation of minority voting strength and the packing of minority districts. For this reason, it is important to undertake a jurisdiction-specific analysis to determine the percentage minority population needed to produce effective minority districts.

Drawing a district in which the minority group has a simple population majority is usually insufficient for creating an effective minority district because it is often the case that, even though minorities comprise half of the population, they may not comprise 50 percent of the voters. There are several reasons for this: there are typically more noncitizens among minority (particularly Hispanic) populations; the voting age population is usually a lower proportion of the total population among minorities; and minorities tend to register and turnout at lower rates than Anglos. Each of these differences has an effect on minority voting strength and therefore must be considered when determining the percentage minority population needed to create an effctive minority district.

The central basis for effective minority voting equality is usually considered to be the percent minority population needed to equalize Anglo and minority turnout at the polls. In order to determine the percentage minority and Anglo turnout, a simple algebraic equation is employed. If, for example, 29 percent of the Anglo population turns out to vote and only 21 percent of the black population turns out, the following equation must be solved (where X is the percentage black in the population, and 21 and 29 are the percentages of Anglos and blacks turning out to vote):

$$21X = 29$$
$$21X = 29 - 29X$$
$$50X = 29$$
$$X = .5800$$

A district with a 58 percent black population would equalize black and white turnout in this particular example.

In this study, the percent black and Hispanic voting age population needed to equalize Anglo and minority turnout is reported whenever it was possible to calculate the relevant turnout rates. (Turnout percentages by race/ethnicity are estimated using the same two techniques described above for producing votes by race/ethnicity.)

The elections analyzed in this report are all recent statewide, congressional and state legislative contests that included at least one minority candidate. Only elections

in 1986, 1988 and 1990 were examined because: one, the data were most accurate for these years and, two, the courts concentrate their attention on the most recent election contests rather than elections that occurred eight or ten years ago. In some areas where it was felt that a more indepth analysis was necessary (major urban counties with a significant minority population), recent local county elections were also studied. These counties included Dade, Broward, Duval, Hillsborough, Orange and Pinellas. The results of this additional analysis are found at the end of the report.

[Tables Omitted in Printing]

FACTUAL INFORMATION IN RESPONSE TO QUESTIONS POSED BY A "NOTICE TO PARTIES" DATED APRIL 30, 1992

Compiled Under the Direction of

George H. Meier
Staff Director

Committee on Reapportionment
Florida House of Representatives

May 6, 1992

RESPONSE TO ONE OF THE SPECIAL MASTER'S 20 QUESTIONS: WHO WAS INVOLVED IN THE REDISTRICTING PROCESS?

(All organizations listed appeared and spoke via a representative, of at least one of the 32 public hearings.)

PARTICIPATING ORGANIZATIONS

State Republican Party
State Democratic Party
Okaloosa School Employees
Okaloosa League of Women Voters
Santa Rosa County Republican Executive Committee
Okaloosa County Democratic Committee
Escambia County Republican Party
Pensacola Bay Area League of Women Voters
Pensacola Branch of NAACP
Escambia Democratic Party
Escambia County Concerned Citizens
Bay County Republican Executive Committee
Bay County Chamber of Commerce
Association of Bay County Educators
Gulf County Classroom Teachers Association
FTP-NEA
Leon County Classroom Teachers Association
Common Cause
Florida League of Women Voters
Tallahassee National Organization for Women (NOW)
North Florida Reapportionment Coalition
Columbia County Republican Party
Lake City Branch of NAACP
Lake City GOP
Marion County Republican Party
University of Florida Student Body
Florida League of Women Voters
Alachau County League of Women Voters
Gainesville Chamber of Commerce
Jacksonville Branch of NAACP
Jacksonville NAACP Reapportionment Committee
St. Johns County Preservation Association
Polk County Coalition for Congressional Unity
Hardee County Democratic Party
Manatee County League of Women Voters
Manatee County Republican Executive Committee
Manatee County League of Women Voters

St. Petersburg Branch of NAACP
Pinellas County Democratic Party
Florida State Conference of NAACP
Democratic Black Caucus of Florida
Pinellas Chapter of the Democratic Black Caucus of Florida
Upper Pinellas Common Cause
Pinellas National Organization for Women (NOW)
Pinellas Park Chamber of Commerce
Dade County Republican Party
Dade County Fair Reapportionment Task Force
Miami-Dade Branch of NAACP
Black Lawyers Association of Dade County
Greater Miami Black Resource
South Florida Association of Black Psychologist
Unrepresented People's Positive Action Council, Inc. (UP-PAC)
Republican Party of Dade County
Florida Young Republicans
Haitian/Carribean Community
Boycott Miami Coalition for Progress
Concerned Citizens of Northwest Dade
Bay View Point Condominiums
Wilshire Condominiums
NEW Democratic Club
Admirals Port Condominum Association
United Democratic Club
South Florida Coalition of Black Trade Unionists
Dade County Democratic Party
McCall Community Foundation
Kendall Federation of Homeowners Association
Black Lawyers Association of Dade County
Mexican-American Council
Vision Council, Inc.
Mexican-American Community
Dade County Fair Reapportionment Task Force
South Dade Community Council
W. Perine Christian Association

Greater Boca Raton Chamber of Commerce
Atlantic Democratic Club
Century Village West Democratic Club
Florida League of Women Voters
Voters Coalition in Palm Beach County
West Boca Community Council
Republican Executive Committee
Democrats of Greater Boca Raton
Dade County Reapportionment Task Force
Rock Island Community Development Group
Broward County Reapportionment Task Force
Urban League
Haitian American Democratic Club of Broward County
Bar Association of Broward County
Black Pan Hellenic Council
Alpha Phi Alpha Fraternity
Dorsey-Riverbed Neighborhood Association
A. Philip Randolph Institute
Broward County Jamaican Citizens
Tri-County Chapter of the National Forum for Black Public Administration
Joint Council of Aventura, Inc.
Concerned Citizens of Northeast Dade County
Point East condos
St. George Civic Association
Lee County Democratic Party
Lehigh Acres Community
Florida Women's Political Caucus
Charlotte County Republican Executive Committee
Lee County NAACP
Collier County Republican Executive Committee
Collier County League of Women Voters
Collier County NAACP
Taxpayers Action Group (TAG)
Black Betterment Committee
Hendry County Republican Party
Florida Women's Consortium
Golden Lake Village

West Palm Beach NAACP
Democratic Women's Club
Blacks on the Serious Side (BOSS)
St. Lucie County Democratic Executive Committee
Democratic Executive Committee, Redistricting Committee
Martin County Republican Executive Committee
Melbourne/Palm Bay Chamber of Commerce
Delta Sigma Theta Sorority Minority Reapportionment Committee
Brevard County Republican Party
Broward County Reapportionment Task Force
Broward County NAACP
NAACP State Conference of Branches
One Hundred Black Men of Ft. Lauderdale
Orange County Political Coalition
Black Caucus
Deland Chamber of Commerce
Daytona Beach Chamber of Commerce
Mid Florida Business and Research Center
Deltona Municipal Services District
Volusia/Daytona Beach NAACP
Republican Party of Marion County
Polk County Coalition for Congressional Unity
Hillsborough County League of Women Voters
Florida Coalition for Fair Representation
Senior Citizens Downtown
Greater Tampa Urban League, Inc.
Friends and Neighbors in Land-of-Lakes
Brooksville League of Women Voters
Greater Hernando Chamber of Commerce
Greater West Hernando Chamber of Commerce
Republican Party of Hernando County
Dade City Chamber of Commerce
Project PUSH (Political Unity for Spring Hill)
Florida Silver Haired Legislators
Democratic Club of Hernando County
Florida Citrus Mutual

Central Florida Development Council
Polk County Young Democrats
Lakeland Economic Development Council
Department of Florida Disabled Veterans
Polk County League of Women Voters
Orlando/Orange County Convention and Visitor Bureau
Orange County Republican Executive Committee
Orlando Branch of NAACP
Orange County Political Coalition
Cuban American Bar Association
Coalition of Hispanic American Women
Spanish American League Against Discrimination (SALAD)
Nicaraguan American Bankers and Businessman's Association
League Against Cancer, Inc.
Hispanic American Builders Association (HABA)
Dade County Fair Representation Task Force
Dario Las Americas (Newspaper)
Concerned Puerto Rican Alliance
Latin American Chamber of Commerce (CAMACOL)
Association of Afrocuban-Americans
Nicaraguan Medical Association
Hialeah Chamber of Commerce
Hialeah Young Republicans

CENSUS BUREAU CITIZENSHIP DATA

[SEAL]

UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS
Washington, D.C. 20233-0001

November 19, 1992

Mr. John Guthrie
Florida Senate
726 Capitol
Tallahassee, Florida 32399-1100

Dear Mr. Guthrie:

This letter is in response to our telephone conversation of November 18, 1992. You requested all available materials concerning the bilingual ballot provisions of Voting Rights Act coverage for Dade County, Florida. A copy of the tabulations for Dade County, and a memorandum describing the full package of tabulations from which they have been taken, is enclosed. As I noted to you in our conversation, a full tabulation of citizenship by race/ethnic statuses does not exist. The tabulations you have here are all that exist on this topic, to my knowledge, for Dade County.

Based on the photocopy charges, the cost of the material you requested is $10.00. Please make your check or money order payable to Commerce-Census and send it, along with a copy of this letter, to the Statistical Information Staff, Population Division, Bureau of the Census, Washington, D.C. 20233.

If I can be of further help, please contact me on (301)-763-1154.

Sincerely,

/s/ Robert Kominski
ROBERT KOMINSKI
Chief, Education and
Social Stratification Branch
Population Division

Florida County Level			Voting Pop. -T-	English Not Only Language -U-	English Less Than Very Well -V-	English Less Than Well -W-	English Not Spoken -X-
A—Florida	12	# Tot.	987346	410532	174722	79437	17382
B—Dade County	025	%	100.0	41.5	17.6	8.0	1.7
		# Ilt.	27868	16707	13619	9822	3775
		%	2.9	4.1	7.8	12.4	21.8
D—American Indian	1	# Tot.	1517	360	169	88	13
E— Total		%	.1	.0	.0	.0	.0
F— Total		# Ilt.	55	44	39	29	3
G— Flags 00001-00001 2240		%	3.7	12.3	23.1	33.0	23.1
D—American Indian	1	# Tot.	112	112	69	25	3
E— Total		%	.0	.0	.0	.0	.0
F—Mikasuki	917	# Ilt	37	37	32	22	3
G— Flags 00001-00001 2240		%	33.1	33.1	46.4	88.0	100.0
D—American Indian	1	# Tot.	109	88	54	20	3
E—Miccosukee	437	%	.0	.0	.0	.0	.0
F— Total		# Ilt.	32	30	25	17	3
G— Flags 00001-00001 2240		%	29.4	34.1	46.3	85.0	100.0
D—American Indian	1	# Tot.	88	88	54	20	3
E—Miccosukee	437	%	.0	.0	.0	.0	.0
F—Mikasuki	917	# Ilt.	30	30	25	17	3
G— Flags 00001-00001 2240		%	34.1	34.1	46.3	85.0	100.0

Florida County Level			Voting Pop. -T-	English Not Only Language -U-	English Less Than Very Well -V-	English Less Than Well -W-	English Not Spoken -X-
D—American Indian	1	# Tot.	57	28	18	5	0
E—Seminole	438	%	.0	.0	.0	.0	.0
F— Total		# Ilt.	7	7	7	5	0
G— Flags	00001-00001	%	12.3	25.0	38.9	100.0	.0
2240							
D—American Indian	1	# Tot.	20	20	13	3	0
E—Seminole	438	%	.0	.0	.0	.0	.0
F—Mikasuki	917	# Ilt.	5	5	5	3	0
G— Flags	00001-00001	%	25.0	25.0	38.5	100.0	.0
2240							
D—Asian American	3	# Tot.	7972	5092	1950	516	32
E— Total		%	.8	.5	.1	.0	.0
F— Total		# Ilt.	213	161	134	91	6
G— Flag	00100-00000	%	2.7	3.2	6.9	17.7	18.8
D—Asian American	3	# Tot.	1489	1489	981	392	24
E— Total		%	.1	.1	.0	.0	.0
F—Chinese	708	# Ilt.	145	145	118	91	6
		%	9.8	9.8	12.1	23.3	25.0
D—Hispanic	4	# Tot.	350499	332451	153529	73631	16946
E— Total		%	35.4	33.6	15.5	7.4	1.7
F— Total		# Ilt.	14655	13833	11799	9161	3739
G— Flags	11110-01110	%	4.2	4.2	7.7	12.5	22.1
D—Hispanic	4	# Tot.	330493	330493	152886	73403	16933
E— Total		%	33.4	33.4	15.4	7.4	1.7

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F—Spanish	625	# Ilt.	13745	13745	11744	9132	3733
G— Flags	11110-01110	%	4.2	4.2	7.7	12.5	22.1
D—Hispanic	4	# Tot.	12744	12136	5832	2037	470
E—Colombian	234	%	1.2	1.2	.5	.2	.0
F— Total		# Ilt.	320	314	254	129	85
G— Flags	00110-00000	%	2.6	2.6	4.4	6.4	18.1
D—Hispanic	4	# Tot.	12050	12050	5832	2037	470
E—Colombian	234	%	1.2	1.2	.5	.2	.0
F—Spanish	625	# Ilt.	314	314	254	129	85
G— Flags	00110-00000	%	2.6	2.6	4.4	6.4	18.1
D—Hispanic	4	# Tot.	46467	42376	16482	7160	1748
E—Puerto Rican	261	%	4.7	4.2	1.6	.7	.1
F—Total		# Ilt.	2891	2646	2171	1629	670
G— Flags	00110-00110	%	6.3	6.3	13.2	22.8	38.4
D—Hispanic	4	# Tot.	42284	42284	16476	7154	1742
E—Puerto Rican	261	%	4.2	4.2	1.6	.7	.1
F—Spanish	625	# Ilt.	2620	2620	2165	1623	664
G— Flags	00110-00110	%	6.2	6.2	13.2	22.7	38.2
D—Hispanic	4	# Tot.	240858	232685	111820	55435	12463
E—Cuban	271	%	24.3	23.5	11.3	5.6	1.2
F— Total		# Ilt.	8939	8500	7488	5943	2348
G— Flags	01110-01110	%	3.8	3.7	6.7	10.8	18.9
D—Hispanic	4	# Tot.	232191	232191	111689	55383	12456
E—Cuban	271	%	23.5	23.5	11.3	5.6	1.2
F—Spanish	625	# Ilt.	8487	8487	7475	5934	2348
G— Flags	01110-01110	%	3.7	3.7	6.7	10.8	18.9

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[SEAL]

UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS
Washington, D.C. 20233-0001

June 8, 1992

MEMORANDUM FOR THE RECORD

From: Robert Kominski
Chief, Education & Social Stratification Branch
Population Division

Subject: Detailed Research Tabulations on Voting Rights

This document acts as a guide for interpreting the package of detailed tabulations provided to Congress and the Justice Department in June 1992 for their research in determining the effect of various alternative criteria in the reauthorization of the Voting Rights Act.

There are a number of subtabulations in the package. These are: a summary state-level tabulation, an Indian Reservation tabulation, and detailed tabulations for each state. Each tab has several rows and columns shown for each identified "language minority" group. The colums are labelled as the "Voting Pop" that is, the voting age citizen population, "English not only language"—those who reported they speak a language other than English; "English less than very well"—those who said they speak English well, not well, or not at all; "English less than well"—those who said they speak English not well or not at all; "English not spoken"—those who said they do not speak English at all. Each successive column is a population subset of previous columns.

The first row in a sequence of four shows the estimated number of persons who meet the stated criterion in the column. The second row shows the proportion that a given column is of the total (first column). The third row shows

the number of persons in the column who have completed fewer than 5 years of schooling (that is, are illiterate by definition of the Act). The fourth row shows what percentage the third row value is of the first.

Letters at the left-hand side of the tabulations indicate the "level" of the tabulation. "A" indicates a state or reservation; "B" is a political jurisdiction (generally counties); "C" are subdivisions within counties; "D" are the aggregate language minority groups—American Indian, Eskimo or Aleut, Asian American, and Hispanic; "E" are subgroups of the "D" level, for example, Indian tribes, Eskimos alone, or specific Asian groups like Japanese or Filipino; "F" are specific languages; and "G" is a summary set of ten 0-1 flags which tell the following about the tabulated group:

Flag 1: D-level group exceeded 5% of the total voting age citizens in the state

Flage 2: D-level group exceeded 5% of the total voting age citizens at the B or C level

Flag 3: D-level group exceeded 7,500 voting age citizens at the B or C level

Flage 4: D-level group exceeded 10,000 voting age citzens at the B or C level

Flag 5: D-level group exceeded 5% of the voting age citizens within an Indian reservation

Flags 6-10 repeat this information, but the determination is based on the number of people who speak English less than very well, as opposed to simply all members in the group. In short, the first 5 flags incorporate a qualifying notion similar to that before the passage of the Nickles amendment, while flags 6 through 10 reflect the Nickles amendment criteria.

In general, for the state-specific tabulations, we show a data block (four lines) anytime a group constitutes a minimum of 2% or 3000 of the voting age citizens. In

addition, we show the largest non-English, language, or any that qualify.

The first tabulation is a summary state-level tab only for purposes of determining those states that may qualify for statewide coverage under Section 203c. As can be seen in the printout, in most states no groups qualify, which is why only a total block for the entire state is displayed. In some states a group might qualify if pre-Nickles criteria were used, but in only two states—New Mexico and Texas—does a group (Hispanics) meet statewide qualification under the Nickles guidelines.

The next tabulation shows the results of the Indian Reservation determinations. This tab shows the results for the reservations themselves, that is, which reservations might possibly qualify, and for what group(s) . Note that the determinations are not limited to Indian groups.

The remaining tabulations are the detailed state-specific runs, incorporating both the statewide determination rules, the 5% political jurisdiction rule, the numeric minimum cutoff rule (again going down to 3000 persons), and an Indian reservation qualification rule. In the case of the latter situation, if an area in a county was qualified because of the Indian reservation guideline, the numeric code for the reservation(s) in question is noted immediately below the "G" level line. In Apache County, Arizona, for example, note that the county qualifies for the Apache language because of Reservation 1140. This code denotes the Fort Apache Reservation in Arizona, identifiable by the 1140 code on the "A" line in the reservation tabulation. Looking at the second data panel for that reservation, one can see that Apache speakers who speak English less than very well constitute 38.5% of all the voting age citizens on the reservation, and that this group has an illiteracy rate of 2.6%. Consequently, the reservation qualifies. Since Apache County Arizona contains a part of this reservation, it is qualified by the reservation (even though most of the American Indians

who live in this county speak Navajo, as shown in the Apache County tabulation). Gila and Navajo Counties also contain part of this reservation and for this reason are also qualified by the reservation.

These tabulations were designed to address a wide variety of questions about various alternative constructions and implementations of the Voting Rights Act. If there are questions about any of these data, please contact me on (301)-763-1154.

cc: Schneider (POP)
Norton
Walsh (DOD)
Chron

EXCERPTS FROM THE TRANSCRIPTS OF THE CONGRESSIONAL REDISTRICTING HEARING

5/5/92-5/15/92

TESTIMONY OF THEODORE ARRINGTON
TR VOL. III

* * * *

[6] Q Dr. Arrington, in your opinion, how should a congressional plan be evaluated to determine whether or not [7] it provides a fair opportunity for minorities of race and language to vote and meaningfully participate in the electoral process?

A The first thing you have to look for is whether existing concentrations of the minority population has been cracked or split among several districts.

Q Could you explain what you mean by "cracking"?

A A cracked area is one where an existing minority population is split into two or more districts instead of keeping them together in one district. To the extent that minority concentrations are split or cracked, you have a clear violation of the Voting Rights Act. That's the first thing you do.

Would you like me to go on?

Q I would like you to go on, yes.

A The next thing, though, is a harder question, a question that I think most of this hearing has been about and one in which the Court will have to come up with an answer. All of the plans that have been presented, so far as I can tell, have been careful not to crack existing minority populations. They draw those minority districts somewhat differently from one plan to another, and some of those districts are better than others; but, basically, they have observed that very first rule of not cracking existing concentration of minority population.

[8] The problem comes in with the next step; and that is, what do you do with concentrations of minority population which are not large enough to be the base of a majortiy black or majority Hispanic district? Obviously, you don't crack such small areas. But what do you do with them? Do you put them in a district with white areas so that they will be a minority? Do you take several of these concentrations and connect them together in what I think I would prefer to call a pearl necklace district?

An answer to that is, if I were doing it, if I were hired as the expert in this case to draw the districts, I would feel obligated to try to go beyond the single black district that everyone has drawn in the Dade County area. I would feel obligated to go beyond that. Now, admittedly, when you go beyond that, you are going to create a district which is not pretty.

There's a trade-off in terms of the various values that we want to accomplish in districting. Compliance with the Voting Rights Act obviously is a very important value. Compact districts, because of the ease of administration, the ease of the understanding of the voters, for a number of reasons, are also an important value. Unfortunately, in this world, you cannot maximize all of the values, and so you have to make some trade-offs. If I were doing it, I would feel an obligation under the Voting Rights Act to [9] create a second, perhaps a third, black district. What do you do when you go beyond the single concentrations? What do you have to look for? Well, I would say, first of all, you have to look for a community of interest in those separate minority communities that you are joining together, and you have to say, is there a community of interest among those separate aggregations that you're putting together in your pearl necklace?

Q. And, Dr. Arrington, what do you mean by a "community of interest"? How do you define it?

A If you ask a half dozen of witwnesses that question, you will likely get about half a dozen different an-

swers. That is not an area, yet, that has been very carefully developed. What I would look for is a similarity in lifestyle. I would—especially when you are talking about congressional districts, I would look for similar attitudes on national issues, similar needs from the federal government as expressed in the attitudes and the desires of those communities. And, if you see those communities typically desiring the same kinds of things from the federal government, the same kinds of policies, then you have a clear, for congressional districting purposes, community of interest.

I would also want to look for whether they express their community of interest, their similarity of community of [10] interest, in terms of voting the same way for statewide or national offices. That's a good indicator, and an indicator that I have used in other cases, to tell me that desperate communities, communities that are separate geographically, actually have a community of interest.

For the Hispanic community in Florida this is particularly difficult because the Hispanic community is diverse both racially and in terms of nationality. That is not a homogeneous population.

In terms of the black community, I would make a very different argument. And I want to be careful here, because I don't want my good friends in this audience who are black to think that I'm saying all black people are alike. I'm not saying that. But there is a sense in which race is such an important factor in our society, is such a determinative, the way people live, their lifestyle, their chances in life, there is a sense in which black people almost always have some community of interest. And so it's easier to put together separated concentrations of black voters into a single district and to justify that than it would be, say, for Hispanics or for other minorities in other places.

The question of how many of these districts we should draw then is a very difficult one. It first of all involves

how many can you draw physically, and it involves the question that the Court, and only the Court can determine in [11] this case, how much of compactness, how much difficulty of administration of the districts, how much difficulty in campaigning in the districts will be sacrificed in order to draw additional minority districts?

The question the Court has to determine is how many they are allowed, that they think the law allows them to draw, how many should they draw, how many must they draw.

The only other question seems to me to be very much in evidence as a dispute in this case is the question what constitutes a minority district.

Would you like me to go into that?

Q I would like you to explain what, in your opinion, constitutes a minority district.

A The courts initially insisted that the minority district needs to be a super-majority—that is, it needed to be a 65 percent population—in order to assure that it's at least 60 percent voting age population district or black VAP or Hispanic VAP—"V-A-P" as we often say.

That has been modified somewhat, but I think it's also been distorted by a number of people over the course of some of these cases.

The Court has clearly said, it seems to me, that experts should rely on voting data and turnout data to determine whether a particular black district might be packed; that is, do you really need a 65 percent if you look carefully? [12] At turnout data and voting data, you may determine that a good reliable black district, for example, or a good reliable Hispanic district, does not require a 60 percent black VAP, but I do not believe it is reasonable to use what I call the algebraic formula approach to construct the district which is 30 percent black or 35 percent black, and then to pronounce that that's really a majority black district because some black has won there; or because, if you put in the right algebraic numbers, you can determine that a black could win.

The object of drawing black districts is to draw districts where blacks can control. That's what you want to do first, or Hispanics.

Q And, in your opinion, what is the minimum percentage that you need to have a black controlled district?

A The very word itself, majority district. It must be a majority of something. And, to me, that means the voting age population. And I would say an absolute minimum, no matter what the algebraic numbers come back to mean, that you need to draw a 50 percent plus VAP district. I'm uncomfortable really with that. I'd like to have higher numbers than those, but you have to be realistic about what's possible in each jurisdiction.

Q And what number do you start to feel comfortable for a black district to control?

[13] A I get real comfortable at 55 black VAP. When I get to 60, I begin to get uncomfortable, because at that point I begin to thing about packing. But, again, where packing occurs is something that I am comfortable in determining on the basis of historic knowledge of the black and white turnout and the typical black and white crossover vote. I'm not comfortable in determining that to see how low I can go, and I think that's an important distinction. And I know on one side of the room I'm getting some nods, and I want, if I can, to get some nods on the other side, by saying however—

(Laughter.)

MR. ZACK: We will start nodding, if that will make him feel better.

THE WITNESS: That does not mean that your responsibility, in my view, that your responsibility has ended when you have drawn as many black majority districts as you can. If in a particular area of the state it's not possible to draw a black majority district, but it is possible to concentrate the black population in order to draw a district in which blacks would be very influential,

then I think you have an obligation to do that. And, as I say, I got some nods on the other side of the room.

* * * *

[24] Q And, Dr. Arrington, I would like to summarize if there are other factors you feel this Court should consider in evaluating, not only the Common Cause plan, but also the other plans before it as it attempts to draw districts that will last for the last ten years.

A I think there are a couple of things. The first one is, in drawing the Hispanic district, you've got to remember the diversity in the Hispanic community in Florida, and you have to be very careful about how you combine neighborhoods in those Hispanic districts that may have very different kinds of Hispanics and may cause, if you don't draw the districts carefully, may cause you to draw a district in which, in fact, because the Hispanic community will not be cohesive, it will not be able to win that district, and you have to be very careful about that.

Secondly, I would say that we already know that to draw enough minority districts is going to require drawing some districts that are going to look very bad. They are going to be difficult to administer; they are going to be difficult for the public to understand. Because of that, it seems to me, it is ever more important that the other [25] districts, you see the other 18 or 19 districts, then need to be drawn very carefully to follow established lines in the state, to follow county boundaries where you can do that, to follow traditional boundaries, to be as regularly shaped as you can make them. So that, overall, the plan will make some sense, because you are going to have, what I call, pearl necklaces or what several attorneys have called buck splatters, you are going to have some of those evidently. So you need to be careful to make sure the rest of the districts are drawn carefully.

Then, when you've done that, you have to check those districts for partisan fairness. And if they are not fair, try to redraw them, if that's possible. But, again, that

may not be possible. Again, you were juggling all of those balls. The Court will simply have to suffice and do the best it can.

* * * *

[27] Q Dr. Arrington, my name is Brenda Wright, for the Humphrey intervenors.

You mentioned criteria that one applies in redistricting, and you said that the paramount criteria that you would consider was the Voting Rights Act first?

A Well, one person/one vote first, and then the Voting Rights Act, absolutely.

Q And then you also mentioned after that compactness, correct?

A Yes.

Q And would it be fair to assume that compactness comes down a little bit lower in that ranking because, unlike the [28] Voting Rights Act, there is no federal compactness act?

A That's correct.

Q Now, you mentioned that the obligations of someone drawing—

A Can I add something to that? I think, obviously, there is a federal regulation called the Voting Rights Act; but I also believe, just a matter of what is fair and just in redistricting, the point of drawing districts is to create a situation in which people are represented, and that includes represented in any way that they think is important. And you see tremendous cohesion in the voting of the black community and, to some extent, the Hispanic community. So, they are indicating to us that they want to be represented as such. So, I think there is an obligation there, even if the Voting Rights Act did not exist.

Q I understand. Now, you mentioned that the obligations of someone drawing a plan do not necessarily end when you have looked at the majority black or Hispanic voting age populations that you can draw, correct?

A That's correct.

Q And that would mean, would it not, that, if you were presented with a table, such as the one you see on that easel in front of you, a table that takes all of these plans and looks only at the majority black orHispanic voting age population district, and completely ignores the differences [29] in the plans in terms of less than 50 percent VAP district that they would draw, you don't have complete information that you need; is that correct?

A That's correct.

* * * *

[34] A Absolutely.

Q Were you here for the testimony of any of the folks in the Humphrey intervenor case; that would be Gwen Humphrey and Jack McLain, any of those people?

A I lose track of the players, since they don't numbers on their back, but I was here all day and I was here for the last hour, hour and a half yesterday.

Q You heard some of them talking about local needs and local desires, correct?

A Yes.

Q And you heard some of them talking about motivation and reasons and questions that they had, correct?

A Yes.

Q Those would all be ingredients, not necessarily the ingredient, but ingredients in devising a plan, would they not?

[35] A Certainly.

Q As I understood it—and correct, please, if I'm wrong—in the same way that I understood from Mr. Jones, while the Common Cause plan carefully preserves county and institutional boundaries—"institutional" being long time in history of Florida—it seems to me that certainly you were testifying that maybe, just maybe, the Common Cause plan might not achieve all the things we want to achieve in this particular litigation; is that correct?

A That's correct. In fact, I would not put in the "maybe."

Q It will not?

A It will not. We said that.

Q Now, it is your opinion, as I understand it, and you answered the question, do you believe clearly and firmly that there should be additional black minority—majority/minority district?

A I do.

* * * *

[40] Q Dr. Arrington, the answer to the last question was, in your opinion, you would try to draw three black districts?

A I would try to draw three.

Q Upon what facts was that number three based?

A Very simply, if you draw three, then out of 23, that's about 12 percent of the congressional delegation, which is about as close as you can get to the population of the state, which is about 13 percent black, proportionality.

Q Proportionality.

A See, what you are trying to do, according to the Voting Rights Act, is to equalize. You are trying to move to the direction of making the black community and the Hispanic community equal participants in the political process, taken as a whole, and equally able to choose candidates of their choice. When you get to proportionality, you come, in my view, pretty close to being equal at that point, and you say, "Okay, I have done what is my duty to do. I have done enough."

Q But you would agree, would you not, that proportionality is not a requirement of Section 2 to the Voting Rights Act?

[41] A That's correct, it is not a requirement of Section 2. However, I think sometimes we miss interpret that. It seems to me the intent of the—I believe it was the Dolan Amendment, which said that nothing in the act shall be interpreted to indicate proportional representation. The way that is really applies is the following:

A group cannot claim to have a Section 2 violation merely because they do not elect members of their group equal to proportionality. But it seems to me the reverse is not true. It seems to me that it's perfectly appropriate to say that when a group reaches proportionality, there is not a Section 2 violation.

Q Do you have any other personal knowledge of the distribution of the minority population in Florida to support your conclusion that three is the number to shoot for?

A No. I don't know that you can draw three districts that are acceptable. I'm only saying, the question was, how many should you try to draw, and if I were doing it, I would try to draw three. I might conclude that I could only draw two that seemed to me worth drawing, that seemed to me to put together communities of interest, that seemed to me would not unduly sacrifice other values.

Q Would you temper your aspiration to draw three based on the, quote, sufficiently large and geographical compact [42] requirement of *Gingles?*

A No. I think given the technology we have to today—you have to reember that *Gingles* was talking about what you do when you have an at-large situation. And the answer is, you divide them into districts. If blacks are sufficiently large within that jurisdiction, where you had at-large election, sufficiently large to constitute a majority.

When you apply that language to the situation that we're dealing with here, which is the situation where you've got a lot of districts, and you've always had a lot of the districts, that language doesn't quite fit anymore.

Q So, from your perspective, *Gingles* is not a constraint upon the power of the Court to determine the number of districts to be drawn?

A That's correct.

* * * *

[64] Q Dr. Arrington, my name is Perry Odom. I represent the Intervenor Plaintiff Andy Ireland. Isn't there a question on the census questionaire regarding country of origin?

A I think that only applies to people who were born outside the United States. There's a reason, and—I'm not an expert on the census, all right, but there's a reason why that's not very a handy piece of data about the Hispanics in South Florida. I think it has to do with they don't ask [65] that question of everyone, they ask it only of people who were born outside the United States.

Q Is there a question on there about what is their second language?

A I think there is a language question on there.

Q Wouldn't that be some kind of an indicator of the type of Hispanics?

A No, except for those who would say French and therefore you would know they were from Haiti. But, again, one of the reasons that the Hispanic community is diverse is that part of the Hispanic community is also black. And so you can tell that. So that part of the diversity can be told, but there are other divisions within the Hispanic community, and the point is that I can tell where those people are by the census.

* * * *

TESTIMONY OF DARIO MORENO

TR. VOL. III

* * * *

[292] Q Are you familiar generally with the electoral contest of Hispanic candidates in Dade County, State legislative or—

A Yes, I am.

Q When the plaintiff in this case, State Representative De Grandy, first ran for office, do you [293] recall that election?

A I have a vague recollection of it.

Q Do you recall that he, his first attempt was not successful?

A Yes, I do.

Q Do you recall what his party affiliation was when he first ran?

* * * *

TESTIMONY OF MIGUEL DE GRANDY

TR. VOL. IV

* * * *

[49] Q Isn't it correct that there is a county bordering Dade County which has an Hispanic population?

[50] A There are Hispanics everywhere in Florida.

Q Talking specifically of the county immediately west of Dade, which our House district captures?

A Collier County has Hispanic citizens, yes.

Q Yes. That's a Section 5 county, isn't it?

A That's correct.

Q With Hispanic population?

A That's correct.

Q And in fact it is a Section 5 county because of the Hispanic population, isn't it?

A I believe so.

Q Isn't it correct that—isn't it correct that Cuban-Americans as opposed to the general other Hispanic populations in Florida are generally Republicans?

A No, sir. As a matter of fact in Dade County I looked up the—the records from the Department of Elections, and with exception of the Puerto Rican community, which is 40 percent Republican and 50 percent Democrat, every other group is more Republican than Democrat. That is those Nicarauguans, that is those Colombians, that

is all of those Central and South Americans, Hispanics are more Republican than they are Democrat, with the exception of the Puerto Rican community.

Q And your testimony is that the Hispanic population in Dade County is more Republican than Democrat?

A That is correct, according to the Dade County Department [51] of Elections data that I received from the supervisor of elections.

Q Return, if you know, to the thematic coding of these maps, which you don't know what they were drawn on. What—what is the significance of the color?

A Well, the colors show, one, where the Hispanic populations are, and by the difference in the shading it shows the percentage of concentration.

Q So the thematic is key to the concentration as opposed to the number? I mean, I could have a—have a concentration—what is a high concentration on the thematic? Is that dark brown?

A If you start at the first page of the exhibit that is not numbered, actually the—the last page before you get to page No. 1, that gives you the color code key.

Q And the scale is 30, 35, 40, 60 and a hundred. Do you know why that scale was used, those numbers?

A No, sir.

Q But for the Hispanic population, this more brilliant red indicates the denser concentration of the Hispanics?

A Yes, sir.

Q And I would find, for example, a very small pocket of Hispanics in Glades County, it doesn't show brilliant red on this map, although the number may be, in fact, relatively small, is that correct?

[52] A That's correct.

Q Would you agree that—that perhaps this booklet is a bit misleading in terms of these showings of brilliant colors, given that scale, when in fact the actual numbers are not depicted?

A I wouldn't say they were misleading. What we did, for example, when we used the thematics in the

House map, once you get your color concentration, you would ask the computer the population number and area so that you know what you are putting into constructing each district. They accurately reflect the concentrations, although, as you correctly stated, do not tend to reflect the actual number of people that live in that selected area.

Q This book gives the first part of the question, but as Paul Harvey would say, where is the rest of the story which this book doesn't depict?

A It does not reflect actual numbers of Hispanics, no.

MR. PETERS: Thank you.

I said I would be short. Brief, Judge.

THE COURT: Mr. Burr, are you now ready?

MR. BURR: Yes, sir, Your Honor.

(Discussion off the record)

CROSS-EXAMINATION

BY MR. BURR:

Q Representative De Grandy, what are the Hispanic voting age [53] populations in your District No. 18 and your District No. 21?

A If I can look at the chart?

Q Yes, please.

(Pause)

MR. GERBER: Can you see it here?

THE WITNESS: Uh-huh.

A The voting age populations on District 18, 67.5, and District 21, 70.6.

Q Would you characterize those two percentages as constituting supermajority districts, as that term has been used in the courtroom over the last two and a half days?

A Yes.

Q All right. Was that an important goal that you and the people who you worked with on drawing Plan 212 to have for the two Hispanic districts in Dade County?

A Yes, sir.

Q All right. Explain to me why that was important to you.

A Well, several factors. The most significant of which are—is that there are a lot of Hispanics—Hispanic residents in Dade County as throughout the state that are not citizens and are therefore not registered to vote. And also the fact that at least in the data we had seen there was a low votnig turnout in the Hispanic community.

Q Were you present yesterday during the evening testimony of Dr. Arrington?

[54] A No, sir, I was not.

Q Well, do you believe that it is important to the Hispanics in Dade County to have a supermajority district for the additional reason, that it is important to you as a community to be able to elect the candidates of your choice without having to in effect go to the Anglo power structure in Miami and get their stamp of approval on your candidates?

A Oh, absolutely. We found that—in our experience that there is a lot of polarized voting in Dade County. You can't really go to an Anglo community or to African-American communities and build successful coalitions in that respect.

Q So it is important to you for the Hispanics to be able to do whatever it is they want to do, pursue their goals without having to go to extraordinary length to build shifting and uncertain alliances with other people?

A Yes. It's been my personal experience that the only way the Hispanic community can elect a candidate of their choice is to have a supermajority district.

* * * *

[60] Q Have you heard the testimony given previously in this courtroom the last two and a half days about the

extent of racial polarization and racial bloc voting both from Dr. Stern, Dr. Arrington and various of the other expert witnesses?

A I have observed some of the testimony and I have lived in Dade County.

Q You believe it exists? You know it exists.

A I know it exists. I would also tell you that in even the most polarized election you will get 15, 20 percent, 25 percent crossover vote anyway of more enlightened people that are not prone to racial politics.

[61] Q Representative De Grandy, what did the Dade County branch of the NAACP ask for in terms of black voting age population for the districts that were being drawn in Dade County?

A Voting age population?

Q Yes, sir?

A I don't have a specific recollection. I can tell you that they asked for a majority of black districts, and may very well have asked for over 50 percent of voting age population.

Q Isn't it true, Representative De Grandy, that what you have set out to do is draw the maximum number of districts possible for blacks that gave the superficial appearance of allowing blacks to be elected in those districts?

MR. RUMBERGER: (Indicating)

MR. BURR: I know you don't like the question, but it's properly phrased and it's a fair question, and I would appreciate it if you would let me finish it.

MR. RUMBERGER: Finish your question. I will make the objection.

Don't answer.

BY MR. BURR:

Q Isn't it a fact that you have attempted to draw districts that had the appearance of electability but in fact do not provide electability, and you did so with ulterior motives?

MR. RUMBERGER: Argumentive, speechifying and repetitive.

[62] THE COURT: Overruled.

A No, sir, there were no ulterior motives. As a matter of fact, the Hispanic Caucus of the House of Representatives is very well on record to the extent that we have had to go against our own party. We were more concerned with minority representation. We think the more African-Americans elected to office, the better the Hispanic community will be because there is a significant commonality of interests when it comes to health care, education, when it comes to civil rights legislation and other matters that I think we believe by having African-American representation and the African-American community benefit by having Hispanic representation.

[76] Q Sir, isn't it true that the 20 percent crossover voting that you say exists for any candidate, you were not willing to apply to the Hispanic community to bring down that 65 percent number to 45 percent, isn't that correct?

A I think necessarily it needs to be applied. As I testified, the difference between the African-American districts and Hispanic districts is the high percentage of noncitizens. Therefore your VAP number on Hispanic districts is not reflective as the African-American VAP may be reflected. If we factor that out, we are probably running 45, 46 percent VAP districts in the Hispanic districts that we've drawn.

[77] Q You are saying that a 45 percent VAP Hispanic district will perform for Hispanic where you drew it, is that correct?

A Sir, that's what you just-said. What I just said was that you needed supermajority districts to account for the fact that there is a high number of noncitizens and therefore people that cannot vote. You can put them in a VAP number but they are not accurately reflective of those that can vote because they have the disadvantage of not being citizens. Once you factor those people out, you would probably have, of those registered to vote,

those available to vote, those that are citizens, probably the same VIP—VAP that you have in the African-American communities that we drew.

Q I am asking you a simple question. How many VAP Hispanics do you need to have a controlled district, 47 or 67? You keep changing, sir.

A You need approximately over 65 persons to account for those who are noncitizens.

Q And as far as crossover voting is concerned, the ten percent, 15 percent crossover is washed out by the fact that no group, no matter how cohesive, votes a hundred percent. There is also a 15 percent slack-off even in the most cohesive group, isn't tht correct, sir?

* * * *

[92] Q And how do you define a Cuban or a Hispanic? Is it a person by origin?

A I consider Hispanic basically people that are language minorities and that are of Spanish heritage.

Q And heritage means their father and mother were Hispanic?

A It could mean that you were born and bred in that country, came to this country. It could mean that your parents are Hispanic. That's a definition for the Court to make.

Q And if your parents are Hispanic, both Cubans, and you are born in this country, you are considered Hispanic; is that correct?

A It depends on what definition you're using.

Q By the census.

A The census is self-determination, basically: If you consider yourself Hispanic, because of that, you are.

Q And I would be Hispanic under that definition having a Cuban mother and an American father and living in Cuba until I was 14; right?

A I would guess if you blocked the box that said "Hispanic," you would be considered Hispanic.

Q So, the determination of who is going to vote for who based on Hispanic—matter of fact, the Dade County

Registrar keeps it differently, though. She says if you were born in the United States, that that's the only issue; isn't that correct?

[93] A That's basically correct. The Dade County Department of Elections Classifies Hispanics only those persons born outside the United States.

Q So, there's a great deal of subjectivity in determining who is going to vote for who during the course of any election; isn't that right?

A As to who is going to vote for who?

Q Yes.

A Yes, it's an individual matter.

Q It's not a science; it's an art form of determining elections. That's why you have pollsters and that's why you have political consultants and so forth; right?

* * * *

[106] Q As the Cuban population becomes naturalized, those that are not citizens, they become very active in voting as well; isn't that correct, sir?

A I would say they participate, yes.

Q And, sir, there are more Cuban Hispanics migrating to Dade County than there are blacks? The effective migration rate is greater for Hispanics; isn't that correct?

[107] A It would be reasonable to conclude that.

Q And finally, sir, in the last ten years, whenever there is disruption in South America, you have a new wave of migration of Hispanics to the Miami area, ultimately become citizens. Have you put that possibility in your equation in answering the Judge's question?

A Yes, sir. I disagree with some of the premise of your question that they become citizens. A lot of them do not and that's the problem that we have in crafting these districts. But, yes, I have taken that into account. As a matter of fact, the data and analysis that I have seen show that those Hispanic individuals concentrate and congregate in the Hispanic areas that exist today. They do not move into the African American communities.

Q Have you seen the articles that talk about the wave of Cuban migration to the United States when Castro, one day hopefully, falls?

A Yes, sir; I have seen literature that showed that there will be a cross over; there will be many Cuban Americans going back to the island and many migrating here. And it is expected to level off and equal out.

Q Isn't it true that all those surveys show the same thing, that you have the older Hispanics who are not registered, who are not active, going back to Cuba, but the young Cubans coming into the United States, who in all probability will register [108] and become citizens and, again, increase the Hispanic population in Dade County?

A I would disagree with the premise of your question. As a matter of fact, the older Cuban Americans are the ones that are more active voters than the people, unfortunately, in my generation.

* * * *

TESTIMONY OF DARIO MORENO

TR VOL. IV

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[281] A Yes. In most of the scholarly work done on the Hispanic group—and I refer to the work of Alexandra Portez of Johns Hopkins University, and Ms. Sandra Perez, director of the Cuban Research Institute at Florida International University. These scholars speak in terms of the Hispanic community of Miami as an enclave, as an ethnic enclave. What they mean by this is that this is a community in which people can perform all the basic functions of daily life—banking, seeing a lawyer—

Q We like that.

A —medicine, dentistry, schooling—without any contact with the dominant—with the dominant culture. So this Hispanic enclave in my mind represents the—should

be preserved in order to maintain the community of interest of the Hispanic population of Dade County.

* * * *

[284] Q Now, Dr. Moreno, at our request, did you make a study or a determination or obtain information which will be useful to the Court in determining the impact of future population fluctuations on these two Hispanic districts in South Florida?

A I didn't do a study, but I think I can make the following observation—

MR. ZACK: He didn't make a study, but he is going to make observations. Is that what he said?

[285] MR. RUMBERGER: Yes.

MR. ZACK: I object to somebody who observes without making a study of it.

THE COURT: Overruled. That goes to the weight.

THE WITNESS: In the 1960s, seventies and eighties, the Hispanic population of Dade County has basically been held hostage to political events in the Caribbean. The revolution in Nicaragua brought in—the census said 79,000 Nicaraguans. The correct figure, if you add the aliens to it that didn't file census for obvious reasons, is probably closer to a hundred thousand. The Mariel boat lift added 125,000 Cubans to the Dade County population. Political unrest in Colombia, Peru, Venezuela added about 75,000 other South Americans and Central Americans. So any projections of population growth in Dade County is very, very difficult.

However, we can say the following: That if you look at the settlement patterns of the Hispanics who arrived in the 1980s and in the 1970s, they tend to follow a pattern of settling in the old traditional Hispanic neighborhoods. In fact, the 1990 census revealed that a good portion of the poor, of the newly immigrant poor, who settled in Dade County settled in the East Little Havana area of Dade County. What happens is that the present Hispanic population in those areas then moved into either the West [286] Kendall area, wealthier Hispanics moved into Coral Gables or the central section of Miami Beach. And, in fact, the two fastest growing Hispanic populations in Dade are occurring in the Kendall area in West Dade, plus the significant growth in Coral Gables and in the Miami Beach area.

Q Is the Hispanic population in Kendall significant at the present time?

A It is extremely significant.

Q And you expect it to grow over the next ten years?

A If we look at current settlement patterns, it will probably continue into the 1990s, being the fastest growing area within Dade of Hispanic population.

* * * *

[289] Q Dr. Moreno, in your report where you express a concern that the Hispanic community be able to elect candidate of choice and participate in the political process without having to make an alliance with nonHispanic members of the community, you are very concerned about the percentage of the voting age population. Is that a fair statement?

A I think that is a fair statement.

Q Were you present during the testimony of Mr. Webster today?

A Yes, I was.

Q So, it is fair to say that you would disagree very strongly with Representative Webster's notion that voting age population is really not that important; it's on a scale with everything else?

A I will answer your question this way: I think the voting age population in the formation of congressional districts is of vital importance.

* * * *

[299] Q In doing your analysis for the plaintiffs, did you do any racial bloc voting or—

A Yes, I did. I did homogeneous precinct analysis.

Q Why just that?

A The reason are twofold: First, when you do homogeneous bloc analysis in Dade County, you are only dealing with 41 Hispanic precincts and about 51 black precincts. Moreover, when you do the more fancy regression analysis, the figures don't change. In fact, what they tend to do is become more extreme. You know, in some of the races, I did a couple of tables on racial bloc voting, and what happens is, when you do regression analysis, sometimes you get a hundred percent, and I just don't believe that, you know. And so I think homogeneous analysis, precinct analysis, is a much better way.

Q You define your precinct as one with 85 percent black, 85 percent non, 70 percent Hispanic; is that right?

A Right. And the reason for the lower Hispanic is, as you know, Dade County registrar only counts Hispanics those Hispanics born outside of the United States and those born [300] in Puerto Rico. Even though I was born in Havana, my little precinct card says I'm white. So the registration figures, you can probably add the 70 percent Hispanic precincts are probably also 85 percent.

Q Isn't it the general practice of persons doing that to use something more along the lines of a 90 percent precinct?

A The problem becomes, because of the way Dade County registrar of voters count Hispanics, they undercount them. So you don't have 90 percent precincts in Dade.

Moreover, I set the standards, you know, going back when I took that course, it was 70 percent is fine. The higher it gets is better, of course, but 70 percent is considered fine. Also you look—

Q Not better but fine?

A Well, I mean, obviously, 90 percent is better than 70 percent. But you are not going to get 90 percent Hispanic precinct because of the registrar of voters in Dade County counts Hispanics.

Q You say they don't exist in Dade County or—

A You can't get it. They don't—Mario Diaz, the lawyer, is counted as a white.

Q Yes, sir.

A I mean, so you are not going to get those.

Q With reference to the voting patterns in Dade County, your report indicates that you would agree with the [301] proposition that there is bloc voting by nonblacks and whites and blacks against Hispanics?

A Yes.

Q Would it make sense—given that kind of a bloc voting, what would be the preferred combination of population groups into a district? Would you put blacks into a Hispanic district? Would that not dilute their ability to—

A Yeah, I mean, of course. If you put Hispanics into black districts and blacks into Hispanic districts, you dilute their ability. But you have a geographic problem in Dade.

Q Yes, sir.

A And the geographic problem is that the Cuban enclave, which I described, basically goes from east to west, right? The black population of Dade County goes from north to south.

Q Yes, sir.

A So, at one point you are going to have intersection, if you are going to create solely Dade precincts. So, you're going to get a—so you are going to, if you want to create Dade-only precincts, you are going to get mixed with blacks. Also it's very important, there is a fracture zone. For example, in the Windwood area, the area around Biscayne, where you have a mixture of blacks, Hispanics, and nonHispanic whites, and, you know—

[302] Q It would help to mix them up, though?

A Yeah. Bascilly, if you—I assume you have been to Miami. Between the McCarthur Causeway and the Julianne Tunnel Causeway, you have some high-rises along Biscayne Boulevard. NonHispanic whites, wealthier Hispanics live in those high-rises. Then you have black neighborhood around them. So in those precincts you are going to get a mixture.

Q You would agree, would you not, that ideally to avoid diluting black voting strength, given the composition in Dade County anyway, it would be preferable to put blacks into a white district rather than an Hispanic district. Is that not correct? Your report is, the pattern of block voting by nonLatin whites against Hispanics is found in elections in all parts.

A Yeah, but the problem—it will be preferable, but you have a geographic problem of the mixture in some areas of Hispanics and blacks in the same precincts, so you are going to get a number of Hispaics in black districts, a number of blacks in Hispanic districts.

* * * *

[322] Now, sir, as the alien citizens becomes naturalized, you would expect them to vote, would you not, sir?

A Yes.

Q And, as a matter of fact, as the citizens have become naturalized they have registered in overwhelming numbers; isn't that correct, the Hispanic citizens?

A Yes.

* * * *

TESTIMONY OF LISA HANDLEY

TR VOL. VI

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[224] Q Well, isn't racial bloc voting—don't Hispanics generally pretty much vote as a group?

A Hispanics are far less cohesive than blacks, but the majority of Hispanics tend to vote for Hispanics.

* * * *

TESTIMONY OF RONALD WEBER

TR VOL. VII

* * * *

[20] Q What is the importance of VAP majority, sir?

A Basically my understanding is that in order for the minority group in question, be that black or African-

American, minority group or Hispanic, in order for them to be able to effectively control the outcome of an election in the district, they need to have a majority VAP in the district.

Q All right, sir. What is importance of registered—of the registration figure on that chart?

A That provides an additional piece of information that Florida is fortunate to be able to provide. Not all states [21] can do this. Basically it says for the same configuration of population is that majority voting age population in fact registered, such that there is also a majority of registrants. You will notice that in the table as far as all of the black or African-American districts there is in fact a registration majority in each of these districts.

Q Sir, how would you evaluate a district to determine whether it provides a fair and reasonable opportunity for both black and Hispanic voters to elect a candidate of their choice?

A You need to start first of all with voting age population and registration figures. That's the basis which you start from. Then you also should have some knowledge or learn something about turnout in the proposed district and then assess whether or not there are differences across the various groups, black, white, Hispanic so on, in the various proposed districts to determine whether or not there is a turnout in majority.

Once you've done that, you can geenrally add that to perhaps some information that you might have about electoral history and to be able to come to a reasonable understanding of the possibility that that district will perform.

* * * *

TESTIMONY OF SUSAN McMANUS

TR VOL. VIII

* * * *

[27] Q Have you done what was requested by the court to look at demographic trends among black and Hispanic voters?

A Yes.

Q And is that contained in Table No. 11?

A Yes.

Q And would you tell the court what Table No. 11 reveals to you and to us?

[28] A Well, what this table shows is that you have some very important dynamics in terms of racial composition trends—racial and ethnic competition—composition trends occurring in South Florida. And I just picked the counties that are in many of the South Florida plans that are districts designed for minorities. And you can clearly see here that in most of these South Florida counties you have a trend whereby the black population growth rate has—is declining and Hispanic growth rate is increasing.

Q Let's take Dade County. What is the change—well, let's—what is the change in Dade County comparing the black percentages to the Hispanic percentages as estimated by your reports?

A These reports, of course—

Q I would like the court to have identified first this chart which is Hispanic and Population Trends, as the court can see, which is the red and which is the black—is it blue? Blue?

Q Will you tell the court what those lines are and who they are reflecting?

A Okay. I'm sorry, I was still on the last table. If I can, I will change from my comments.

Q Okay.

A Last table was based, of course, on U.S. Bureau of the Census statistics for 1980 and 1990.

The chart that you're referring to, exhibit, excuse [29] me. What was the exhibit number?

Q We are going to mark that. We don't have small ones of that. So it will be the next numbered exhibit.

THE CLERK: Senate's 39.

THE COURT: Thirty-nine.

MR. ZACK: Judge, I figured everybody could see it, it was large enough.

THE COURT: Can everybody see it?

BY MR. ZACK:

Q All right. Would you tell the court what that shows?

A This is a chart that was prepared by the Metro-Dade County Planning Department Research Division in 1987. At that time it showed it—it is a trend line projection going to 1950 from the year 2,000. And it clearly shows that the slope of the growth rate in Hispanic population is markedly steeper than the slope of the black population growth rate.

Subsequent to this, preparing for for this presentation, I did contact the Metro-Dade County Planning Department to ask them if they had a more current chart based upon the 1990 census figures and a more current projection chart, at which time the director of that division told me that they did not have that yet but he could definitively say, and he strongly underlined the word "definitively," that this projetcion line—that these projection lines would be even steeper for Hispanics and flatter for blacks in Dade County. [30] And that would be through the next decade.

Q And betwen 1980 and 1990 in Dade County, the black population went up 3.2 percent and the Hispanic population went up to 13.5 percent, if you look at your Table No. 11, is that correct?

A That is correct.

Q And they expect that to continue and have even a more significant disparity between the three groups into the future?

A Yes.

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TESTIMONY OF DAVID GELFAND

TR VOL. XI

* * * *

[24] Q A majority/minority district does not have to be composed solely of blacks or Hispauics, is that correct?

A No, it does not. However, in this particular case, there was substantial testimony that at least in South Florida there was not as much overlap in the voting patterns of blacks and Hispanics. Indeed some testimony was to the effect that the polarization between blacks and Hispanics in South Florida was even more extreme than the polarization between Anglos and whites, and blacks and whites. And for that reason, I have not stressed in the report or in my brief presentation here that some of these districts, for example, in Central Florida, have reasonable numbers of both blacks and Hispanics.

If one were conducting this in Texas or in some other states where there was not that degree of polarization, perhaps that would be a more important point. [25] But I did not stress it here, particularly for South Florida, based on some of the testimony from your case, Mr. Rumberger.

Q I guess the answer is no?

A I said no in the beginning and I say no again, but I was trying to provide an explanation.

* * * *

[72] Q Professor Gelfand, just a couple of questions my associate called to my attention I should be asking—I should have asked and did not—in connection with the South Florida district.

A Yes, sir.

Q I'm assuming you accepted the testimony or at least in part accepted the testimony of Dr. Dario Moreno

concerning the community of interest and the need that the Hispanic/Spanish community has in South Florida for these districts; is that correct?

A Yes, sir.

Q And would you tell us, please, simply what went into your making of those districts as opposed, say, to the districts suggested by the Margolis plan which ran out into Hendry, Collier, et cetera?

A Yes, sir. Well, the testimony, as you know, was pretty clear about the sub-groups of Hispanics. And the Margolis paln and a few others tend to combine Cubans with other Hispanics, Puerto Ricans and Nicaraguans, that did not have the same community of interest and not necessarily the same voting pattern. And, indeed, there were some electoral studies that [73] we had the House run to confirm that.

Q And also if those districts were in fact drawn and drew them in or maintained in subsequent proceedings, it does require complaint of compact two areas essentially; is that correct?

A Yes, sir.

Q It doesn't require traveling any distance to achieve the requisite numbers of VAP in light of the Spanish district?

* * * *

[76] Q "A super majority of the VAP is required for an Hispanic district to be effective, due to the large number of non-citizens and generally lower registration rates among Hispanics in Florida;" is that correct?

A I do state that; yes, sir.

Q And you then state in the first sentence of Paragraph 9, same page, "The State of Florida has a history of legally enforced racial discrimination;" correct?

A That was stipulated to; yes, sir.

Q And it was not stipulated to, but for the purposes of our continuation, I'll just say that's what you said in your report. And Paragraph 10, which is, "This history of discrimination is reflected in the phenomenon of

racially polarized voting." Did you find that as well as a finding of your own?

A Yes, sir; from the record, yes.

Q What caused you to have a finding of racially polarized voting in District No. 23, which I will refer to at all times as your influence district, which is white on your map. Okay? Would you answer that question, please?

A Oh, well, do I agree that District No. 23 is white on my map and that you are going to call it my influence district? Yes; I agree with that.

* * * *

[118] Q What criteria did you use other than VAP in determining if districts are indeed effective?

A VAP was the principal focus as explained in quite a bit of testimony, in particular, Dr. Arrington's testimony and others as well. And, indeed, as I appreciated most of the record and most of the debate—we have more than 2,000 pages of transcript here, total of ten volumes —but a handful of things that are in common: Virtually all of the experts focused on the VAP as a very useful measure in determining effectiveness of a particular district.

Q And yes or no question: Your prediction of a performance of a district you're tending to this Court is based upon VAP [119] numbers alone? Is that yes or no?

A No.

MR. ODOM: Objection, Your Honor, asked and answered.

BY MR. PETERS:

Q I'm sorry; if you would answer.

THE COURT: Overruled.

BY MR. PETERS:

Q I didn't hear your answer.

A No.

Q If it is not based upon VAP alone, where in your report is there any discussion of that alternative basis? I didn't see it, sir.

A You mean additional basis?

Q Yes.

A It was the principal basis, as it was for most of the parties. Other factors were communities of interest. And when there was evidence about polarized voting on particular districts or particular elections or particular areas, there was quite a lot of testimony by different sides about that. It was mixed and balanced, in fact; there was some disagreement about that, of course, as you know.

Q So, the numerical basis for your prediction performance is VAP but you're saying the qualitative analysis based upon community of interest which is discussed in your report; is that what you are saying?

[120] A There are qualitative factors. There are also other quantitative factors besides VAP, as Dr. Arrington explained, help you feel more secure in using VAP, like some of the four black races that were run by several of the experts.

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EXCERPTS FROM THE TRIAL TRANSCRIPTS

6/29/92-7/1/92

UNITED STATES OPENING STATEMENT

TR VOL. I

* * * *

[42] Now, with regard to the specific questions about what are we complaining about. If I may resort very briefly to—and you asked me to try to be district specific, which I think is—

JUDGE HATCHETT: Yes.

MR. HERBERT: —which I think is the way these cases really should proceed, is to outline for you—and we can do this in one or two ways in my proffer. Dr. Moreno can actually stand with me, and he would be one of the principal people testifying about Dade County, and I can actually have him, because he is from Miami, explain to you the district numbers as well as how the contour of these [43] lines fragment the Hispanic population. I can —I can show you exactly, though, on my own at this point, and I know my counsel over there probably won't be able to see it very well, unless they want to come up.

This is a map. I will move that easel back, Judge Stafford. This is a map of the South Dade County area, as proposed by the state in the Senate plan. This is the state's proposed plan, as it is currently before the Court and which we challenge under the Voting Rights Act.

JUDGE VINSON: What is now the state plan.

MR. HEBERT: What is now the state plan. Thank you, Your Honor.

The district—if Dr. Moreno could at least come up and make sure—if you wouldn't mind just standing along side of me and helping me walk through it.

JUDGE HATCHETT: It will save a lot of time if we go through this now.

MR. HEBERT: Okay. This purple district, Dr. Moreno, if you could just very briefly explain the racial

composition of this district—and, by the way, let me just outline it for you.

JUDGE HATCHETT: Well, I don't know if we want him to testify at this point.

MR. HEBERT: Okay. I can go ahead—

JUDGE HATCHETT: The question is: Are you going to [44] be able to show a geographically compact area that could be formed into a majority district. Are you going to be able to do that?

MR. HEBERT: Yes, we are.

JUDGE HATCHETT: That's all we need to know at this time.

MR. HEBERT: And if I may just take it one very brief step further, this district, as drawn by the state, to protect an Anglo incumbent and fragments the Hispanic population, actually goes up into here—and by "here," I'm pointing kind of the Miami Beach area—

DR. MORENO: Liberty City.

MR. HEBERT: —Liberty City, comes down is like this. And we believe that it is drawing districts like this on the Senate side that then prevent the fair line drawing process from taking place, which would result in an additional district for Hispanics in the Dade County area.

JUDGE HATCHETT: How many districts?

MR. HEBERT: There are three districts under the state's plan, and we believe that a fairly drawn plan, and there is an alternative plan before this Court for this area on the Senate side, you would have four districts.

JUDGE VINSON: Hispanic districts?

MR. HEBERT: Four Hispanic majority districts, correct.

* * * *

[45] MR. HEBERT: No, we are not, the United States—

JUDGE VINSON: All right. You are going to tell us what the percentages are. Go ahead.

MR. HEBERT: The Senate plan—the voting age population of districts under the Senate plan that contain

sizeable concentrations of Hispanics are 76.1, 66.3, 64.3, 33.1, 29.9.

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DE GRANDY PLAINTIFFS' OPENING STATEMENT

TR. VOL. I

* * * *

[49] MR. HERBERT: They are separate districts, correct. As I said, what we tried to do—"we" the plaintiffs, and I'm really speaking for all of us, although I probably shouldn't, but we tried to get together and marshall our evidence here, so that we all won't be taking up the Court's time, and we all know nobody's time is more valuable than the Court's time. But we tried to draw a plan that was fairly consistent as much as we could, at least insofar some of these districts go, if we want this Court on an [50] expedited basis to put this plan or some alternate plan into effect for 1992, I feel the plan has to, to the extent possible, do the least amount of disruption, but still protect minority voting strengths.

So that's why there are some districts that may look very similar. To the extent that it could be, some of these districts used the state's plan as a building block.

This is the Reaves, Brown plan, and if I may, this will be harder to see because we don't get quite—we are more up in the space shuttle here looking down at this district. This is the Miami area here, and they have a district, and again you can't see the yellow in here, because we're not down close enough, but this district and this district is connected by geography that is all part of one district, this yellow district. Their district is similar in that way.

All of these districts that are proposed by De Grandy and Reaves, Brown plaintiffs, they do indicate that, based on past election results, that these districts will likely result in Hispanic voters electing a candidate of their choice to the State Senate.

And that really is the difference on the Senate side in the Dade County area. And that really, from the Department of Justice's point of view, is really the focus of what we would like to put on as far as Section 2 evidence [51] on the Senate side.

I don't know if there's anybody else who wants to get into any other parts of the state other than Dade County, or if you have any other questions on the Dade area, but that's our case on the Dade side.

MR. MEROS: Your Honor, that's our focus on the plaintiffs' side with the Senate as well.

JUDGE HATCHETT: All right.

MR. HEBERT: At the very end of my presentation, I would like to give you some estimate of how much time I think it would take to put on our case with live witnesses, but if you're.

JUDGE HATCHETT: We will hear that now.

MR. HEBERT: You'll hear that now?

JUDGE HATCHETT: Yes.

MR. HEBERT: Okay. We believe that we can call approximately maybe a half dozen witnesses, maybe as many as eight, if we have that many—legislators, I know they are in session; it may be hard to get people here. And I would think we can probably put on the entire case—you're hold two, but I don't know if that means two hours or two days.

JUDGE HATCHETT: Why don't we stop and have a conference with counsel?

MR. HEBERT: Could I consult with them for a minute? We haven't actually talked about this.

[52] JUDGE HATCHETT: Yes, talk to them before you make that representation.

(Pause.)

MR. HEBERT: Your Honor—

JUDGE HATCHETT: Yes.

* * * *

[103] MR. MEROS: Yes, sir. I can tell you precisely. We assert, as we have before, two districts in Dade County, two districts that were not drawn. We've discussed that before.

We intend to produce testimony concerning the Alachua/Marion County area, the Putnam—Alachua, Putnam and Marion County areas. We intend to introduce evidence

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[105] JUDGE HATCHETT: All right. Well, we can take care of that. It is this Court's understanding that we are no longer talking about influence districts: that if you show an influence district, your proof fails.

MR. MEROS: Your Honor, what I would propose to show in testimony is a district that will elect a candidate of choice even without majority VAP, voting age population. Gingles does not represent that you cannot have a minority district with a voting age population of less than 50 percent [106] if the facts show that that district will—the minority representation in that district will elect a candidate of choice.

JUDGE HATCHETT: Well, we may be able to save a little time and let the Court talk a little.

(Pause)

JUDGE HATCHETT: Just a minute, Mr. Crowley, we need to do our own research.

(Pause)

JUDGE HATCHETT: All right. We'll come back and let Mr. Meros come back for a minute, Mr. Crowley. And in an effort to save us time at the end of this case, I'm referring now to the 11th Circuit Case of Concerned Citizens of Hardee County versus Hardee County Board of Commissioners. The citation of that case is 906 Fed 2nd 524. Reading from that case: "First, the class must demonstrate that it is sufficiently large and geographically

compact to constitute a majority in a single member district." And that's quoting Gingles.

MR. MEROS: A majority.

JUDGE HATCHETT: A majority.

MR. MEROS: These districts I'm talking about are majority population, not majority—and some of them are majority voting age population. Others are only majority total population.

* * * *

[110] MR. ZACK: As I understand it, the only two parties that intervened at all as to the Senate, other than De Grandy, I heard Escambia as to the rest of them; I want to be clear about that.

JUDGE HATCHETT: That's correct.

MR. ZACK: The other thing is the law of the case, I would again cite to the Court, is on Page 16 of your opinion, where this Court stated that in analyzing the racial fairness [111] factor, the voting age population is the relevant number to be used in determining whether majority in a particular district will be able to elect a candidate of their choice; Solomon versus Liberty City, en banc cert denied, U.S. Supreme Court. And I just—I understand that is—from what I believe I heard the Court say, that has continued to be the law of the case in this matter.

JUDGE HATCHETT: That is the Court's impression of the law until the plaintiffs change that impression by some other law. After they put on their evidence, we'll argue about geographically compact and all of those factors, but we simply wanted the plaintiffs to know that that may be something that they'll be facing.

U.S. ARGUMENT OPPOSING THE SENATE'S MOTION FOR DIRECTED VERDICT

TR. VOL. III

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[193] MR. HEBERT: May it please the Court: I speak today in opposition of the State's motion. What we have established thus far with respect to the Senate plan are the three prerequisites set forth in Gingles. We have at least established enough to shift the burden now to the State with respect to the Senate plan by establishing a prima facie case of vote dilution against Hispanic voters in the Dade County area. How have we done it?

* * * *

DISCUSSION OF SECTION 5 ISSUES

TR. VOL. I

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[23] JUDGE HATCHETT: Well, yes, our previous ruling moots that issue, so the—your motion to quash is denied.

MR. CROWLEY: Granted?

JUDGE HATCHETT: I'm sorry. Granted. The issue is moot at this point, in light of our ruling.

MR. CROWLEY: Thank you.

MR. ZACK: On behalf of the Senate as well, Your Honor?

JUDGE HATCHETT: Yes.

All right. That takes care of those. I think that's all.

(Discussion off the record)

JUDGE HATCHETT: Defendants' Margolis and Gordon's motion to strike. Is that still a life issue?

MR. ZACK: Your Honor, that was the motion that we filed to narrow the scope of the proceedings to the Section 5 issue. I presume that you are going to deal with that in some of the other matters. You may want

to defer that or take it up now. I believe this court's ruling on several other pending motions will address that issue, or part of it.

JUDGE HATCHETT: Yes, we are going to take that up next. For the time being, for the record, that motion is denied, but we are going to discuss Section 5 and what happens now that the Supreme Court of Florida has ruled.

* * * *

[25] (Laughter)

JUDGE VINSON: Mr. Hebert?

MR. HEBERT: Good morning.

JUDGE HATCHETT: Good morning.

MR. HEBERT: With regard to the Section 5 issues and the plan adopted yesterday by the Florida Supreme Court. Let me start at the outset just by noting that when we objected to the Senate plan, our objection, as you know, focused on the Hillsborough County area. And we did not tell the state in that letter how it should go about correcting the dilution of the black voting strength that we found existing in the state's plan. We left that decision, as it properly belongs, in the hands of the State of Florida. The state legislature, however, did not choose to remedy or cure the objection in Hillsborough and deferred, as you well know, to the Florida Supreme Court to undertake and complete and finish the job in the covered areas with respect to the Hillsborough County area.

The state Supreme Court adopted a plan yesterday. We were in receipt of that yesterday afternoon and spent yesterday and last evening and this morning looking at that plan. It was—we were familiar with that plan before the Florida Supreme Court adopted it because it was very similar, if not nearly identical to a plan proopsed by one of the parties to this lawsuit. So we had a leg up going in.

[26] So on our own, sua sponte, we reviewed that plan last night and this morning. I cannot stand here and say the plan is going to be precleared by the Department of Justice.

What I can say, however, is something that I think will give the State of Florida some guidance as to what it needs to do from here. We do not see at this time any problems or barriers that would stand in the way of the Department of Justice giving preclearance to the state's plan, if the state chooses to submit it for Section 5 preclearance. We are prepared to review the plan on an expedited basis. And on an expedited basis I am talking about days, not weeks or months.

The state has filed a response to our motion yesterday that I was served with that has an alarming footnote which suggests that a 1974 Second Circuit case may stand for the proposition that state court decisions do not have to undergo preclearance. We believe that to the extent that that case does stand for that proposition, which I don't think it does, the *Hathorn v. Lovorn* case in the Supreme Court which was I believe seven years or eight years later makes that issue abundantly clear, that the plan does have to undergo preclearance, because what the plan adopted by the Florida Supreme Court does is it requires the State of Florida to implement voting changes, a redistricting in covered counties, and it is the implementation of voting changes by state [27] officials that has to undergo preclearance.

We may not have to have a dispute about that. My learned council on the other side of the room and I have discussed this this morning and we may have come to a meeting of the minds on this point and the state may well intend to submit this for preclearance as early as today. I would leave that to the—to the Assistant Attorney General to advise the court. But we are prepared to turn this thing around as quickly as possible. I spoke yesterday with the department back in Washington, advised them of the plan, I went over some of the details with

them, Assistant Attorney General in civil rights was consulted, and his position—it was his position as well as the United States' position.

JUDGE HATCHETT: Thank you.

JUDGE STAFFORD: Thank you, Mr. Hebert.

JUDGE VINSON: All right, sir.

MR. WAAS: May I, Your Honor?

JUDGE HATCHETT: Yes, Mr. Waas.

(Pause)

(Laughter)

MR. WAAS: I think the court can guess what that is.

JUDGE STAFFORD: Personal service.

MR. WAAS: May it please the court? With respect to the issue of preclearance, hopefully that issue will be a moot issue. We do know that—and observe that yesterday Supreme [28] Court of Florida adopted as the corrective action plan a proposal submitted by the Humphrey plaintiffs, the Reaves, Brown, Hargrett plan. And, of course, under the *Sanchez* case of about 1981, whether that evinces state policy is a matter that hopefully would not have to be addressed, should be a moot point. We ought to be able to get this matter precleared. I certainly think that the Humphrey, Reaves, Brown, Hargrett people on the plaintiffs' side here shouldn't have any concern about the Department of Justice's review of that plan, and that we will then have, without question, a valid state legislative plan for both the House and Senate.

It's been our position all along that with respect to the entire House plan, and with respect to 62 of the 67 counties embracing the Senate plan, that those plans are valid, enforceable and in effect as of the date that the Department of Justice issued its letter just ten days ago.

But we have now had the Supreme Court address that correction, we have a valid plan, it is now time to allow the elections to go forward and all of the matters attendant to the election process. We would hope that this court would allow that matter—those matters to occur.

We do have on the record the demonstration by the supervisors of elections which remains unchallenged that in order for the persons who are constitutionally and statutorily mandated to assure that the right to vote is protected and exercised consistent with [29] law, that these people who run the election machinery must be able to move forward expeditiously. And we would hope that there would be no obstacles placed in the way of that taking place. And that addresses the Section 5 concerns. It also addresses, and we put this in our notice of filing yesterday and in our motion to stay, any concerns set out in any of the plaintiffs' allegations with respect to the 1982 redistricting plan based on the 1980 census which we know was—is invalid at this time because we must redistrict. The legislature has done it, the Supreme Court has done it. Article III, Section 16 has worked.

With respect to the claims that are directed to the congressional plan, that has been taken care of by this court previously.

With respect to any claim seeking to engage in a competitive endeavor with respect to which plan this court may choose, that too is a matter that is now over with and done. The only remaining issues before the court embrace Section 2 and Fourteenth and Fifteenth Amendment consideration.

It would be our position that if that litigation is to go forward, it be done in the manner in which litigation has gone forward is a traditional manner. Let us file our response in a timely fashion, let us engage in the kind of discovery that these cases generate. Plaintiffs have said the words, we have said the words, we all agree that these are [30] fact intensive complex types of litigation, not the kind of litigation that can be addressed in an emergency fashion to adopt a valid plan that will be in place for this election go around in the next three or four days. We now have that plan.

So we would ask in those—in connection with those matters that the plan now go forward, that we have elections, and allow the Section 2 litigation to continue if at all in a dispassionate manner.

JUDGE VINSON: Thank you, Mr. Waas.

JUDGE HATCHETT: Any further argument from the plaintiffs on this matter?

MR. MEROS: Your Honor, on behalf of the De Grandy plaintiffs, I do not argue with his allegations concerning and his argument concerning Section 5 and the fact it needs to be precleared. I won't reargue that. I, of course, do contest what he is saying about Section 2 challenges, whether or not that plan can go forward without consideration.

JUDGE HATCHETT: We will talk about Section 2.

MR. MEROS: Right.

JUDGE HATCHETT: At this point we want to stay on the Senate plan as to Section 5.

(Discussion off the record)

JUDGE HATCHETT: Now, Mr. Meros, we want to be very sure about one thing. We understand, then, that you agree with the Attorney General's position that there is nothing [31] else for this court to do at this time as to the Senate plan under Section 5 of the Voting Rights Act?

(Pause)

MR. MEROS: Your Honor, the De Grandy plaintiffs assert that as we sit here today, there is no legally enforceable plan in effect. It has not been precleared.

JUDGE HATCHETT: We understand that.

MR. MEROS: And to that extent, the section—the—this plan cannot go into effect today. It is not legally enforceable. This court is still in the position of having to adopt an interim plan. The De Grandy plaintiffs do not object to the lines drawn in the Hillsborough County area. So I want to make that—

JUDGE STAFFORD: By the court, the Supreme Court.

MR. MEROS: By the Florida Supreme Court. We object to that fact that the Florida Supreme Court did it. We do not object here to the lines as proposed in that plan.

JUDGE STAFFORD: And it touches nine counties.

MR. MEMOS: Yes, sir. But that is not to say that we do not object—that we consent to that plan going into effect today, or that any plan can go into effect without analysis of Section 2 challenges or that it is legally enforceable anywhere in the state. It plainly is not.

JUDGE VINSON: But Mr. Waas has said for purposes of the ongoing Section 5 case, which is what we have been [32] concerned with up to this point, the state's position is that has now been taken care of by the Supreme Court of Florida, that is the state's plan which they have just submitted.

Separately, the Section 2 claims ought to be dealt with in a more leisurely fashion, he says. But the Section 2 claims remain viable and they are still at issue. Is that what you agree with?

MR. MEROS: Yes, sir. But don't let me suggest to you for a second that—that the 1992 elections ought to go forward with serious—

JUDGE VINSON: I understand.

MR. MEROS: —challenges to other portions of that plan and the House plan, because we would like to argue that because that is critically important.

And also I just want to make sure, Mr. Waas suggests that the plan outside of Hillsborough was at some time enforceable and is today enforceable. It is not. As of today there is nothing legally enforceable in the Senate anywhere in the State of Florida.

JUDGE HATCHETT: Thank you, Mr. Meros.

(Discussion off the record)

MR. CROWLEY: Your Honor, just perhaps a point of just clarification. I just want to reiterate I think what everybody knows and that is that the House plan was

clear—cleared by the Justice Department and there is no bar to its [33] implementation.

JUDGE HATCHETT: Very well.

Now we are going to turn—

MS. WRIGHT: Your Honor, could I just—

JUDGE HATCHETT: Sure.

MS. WRIGHT: I think it's important—I'm Brenda Wright for the Humphrey intervenors. I think it's important to put on the record very clearly what Mr. Waas handed to Mr. Hebert this morning was not a birthday card it was in fact a submission of the State of Florida of the plan that the Florida court adopted to the United States Department of Justice for preclearance. And that therefore it has been submitted for preclearance. It is under that review process.

We support the proposition that it must be precleared. Even though it's a plan that we supported, we believe that's the law.

JUDGE HATCHETT: We understand your position.

MR. GREGORY: (Indicating)

JUDGE HATCHETT: Yes, sir.

MR. GREGORY: May it please the court? Rodney Gregory on behalf of Reaves, Brown, Hargrett. Needless to say, we have absolutely no problem with what the Florida Supreme Court came up with. We have obviously approved the plan, as we did draw the same, and we would like, since apparently there is an agreement here or stipulation, we would [34] with like to see this court also approve the same plan, based on the review and as well as Supreme Court review. So if in fact this federal court were to approve the plan that the Florida Supreme Court came up with, then all that would be together, there would be that much more harmony and the state would be satisfied because they would have that much more additional leverage with the Justice Department's consideration. It would be great to see both courts could actually approve the same Reaves, Brown, Hargrett, Humphrey supported plan.

JUDGE HATCHETT: Thank you, sir.

MR. GREGORY: Thank you, Your Honor.

MR. ABRAMS:. (Indicating)

JUDGE HATCHETT: All right. Yes, sir.

MR. ABRAMS: My name is Willie Abrams for the NAACP plaintiff. Your Honor, we take the same position as the Justice Department that the Supreme Court's plan must be submitted for Section 5 preclearance. And we think once that is done, that the remainder of the case can proceed on a normal litigation schedule.

JUDGE HATCHETT: Thank you.

Now, we want to turn our attention to the Section 2 claims. I just told you that, of course, the Justice Department's case has now been consolidated with the De Grandy case. The motion to consolidate has been granted. I'm not [35] sure where we are as to service in that case, answers and all of those things, but we will leave that aside for right now.

It is the court's belief that a Section 2 case is far different from a Section 5 case, that there are burdens that the plaintiffs must be able to carry, and that due to the shortness of time, the court does not want to spend a lot of time if in fact the planitiffs are not going to be able to carry their burden. Therefore, the court is going to ask the plaintiffs, including the Justice Department to indicate to it what evidence if any you are going to be able to assemble to show bloc voting, to show political cohesiveness, and to show a dilution of minority voting strengths. If—and we believe that that evidence must be directed pretty sharply to the districts, specific districts under attack, not shotgun type attacks. And we are going to take a recess. We will hope that the plaintiffs will tell us whether any such evidence is going to be marshalled and how long it will take, how soon you would be able to put it on.

And I note, Mr. Zack, that you are going to argue, we know you are going to argue to us we should not do that at all, and the defendants will make that argument. When

we come back we will hear that argument. But we do want to hear all aspects of a Section 2 case and how soon it could be put on if in fact it's proper for this court to put it on.

So we will be in recess until 11—10:40.

* * * *

[37] We have reviewed the Florida Supreme Court Senate Plan. We find no constitutional or statutory infirmatives for purposes of Section 5 review by this Court. Consequently, paying due deference to the State of Florida, we adopt the Florida Supreme Court's Plan as outlined in its opinion of June 25, 1992, as the Florida Senate plan.

We are now ready to discuss—of course, a written order to that effect will be entered later today.

We are now ready to discuss Section 2 challenges to the plan.

MR. HEBERT: Your Honor, may I inquire of the Court about the announcement you just made?

JUDGE HATCHETT: Yes.

MR. HEBERT: Does that moot—is the Court saying that the State of Florida does not have to submit their plan for preclearance, and that the Department of Justice —this Court does not envision us to undertake any further review of that plan?

JUDGE HATCHETT: We now impose that plan as a Court-Ordered plan.

* * * *

[66] With respect to the Senate claims for Hispanic voters in Dade County, the NAACP does not have a position on that particular point. However, I would note to the Court that the Justice Department's representative has said here today that what they seek to accomplish on behalf of Hispanics in Dade County can be done without harming the interest of blacks in Dade County. Frankly, the NAACP remains unconvinced about that. We take that representation with a grain of salt, and we would

like the Court to be very cognizant of that and pay close attention, because we—in our analysis, the NAACP's analysis, of the House districts in Dade County, we do not reach the same conclusion that the Justice Department does about that point.

JUDGE HATCHETT: Thank you, sir. We will now hear from the defendants on the Section 2 claims.

* * * *

[78] JUDGE STAFFORD: Mr. Peters, when were you aware that there would be a Section 2 challenge by anybody in this case? You're the same Jim Peters that was here in January saying, "Give the legislature time."

MR. PETERS: Yes, sir.

JUDGE HATCHETT: You and Steve Zack, the same players over here, "give us time, give us time." Now, I want to know when it is that you say that you first became aware of the Section 2 challenge to whatever was going to happen in the Florida legislature.

MR. PETERS: Judge, as you recall, you—and I appreciate that fact—deferred to our defense in January that the Complaint is too early, nothing has passed. And, in fact, the Complaint before this Court in seven of its counts is an impasse suit which just ain't through. There [79] ain't no impasse. I think the only at viable count there is Count VIII, which speaks to the joint resolution which was passed after those other two Complaints were filed.

On April 11, as I recall, sometime in that proximity, we heard for the first time from the De Grandy plaintiffs and from the some of the others, their complaints about a legislative enactment, SJR-2(g), for the first time in the Florida Supreme Court. There wasn't a plan, a Section 2 claim that they could attack prior, because we didn't have court resolution. We knew they didn't like what we were doing. We knew they didn't like it in the abstract but there was nothing for them to attack a Complaint to until we passed the resolution.

JUDGE STAFFORD: Let me find out, in the House and the Senate, the plan, any plan, that was coming up would seem to me would involve, would it not, in the legislative decision, whether it's by the staff or by the elected representative or by the lawyers, some Section 2 consideration.

MR. PETERS: It was and it did, yes, sir.

JUDGE STAFFORD: And you were ultimately going to have to face that. Now, I'm not fussing with you. I guess what I'm trying to get across is, what is it that is out there in the hither somewhere that has not already been captured and put into the pot in this court or is [80] retrievable over the lunch hour? What's new is there under the sun that you have to go out now and create that is not already in the public domain available to us to consider?

MR. PETERS: Procedurally?

JUDGE STAFFORD: Yes, I'm talking about evidence.

MR. PETERS: A Complaint at issue with a mustering of evidence and experts to respond per the rules of court to a Complaint in the time that we have to respond. That was not the case, Judge, until approximately 30 minutes ago, which is our motion to dismiss. We ain't prepared to go to trial, Judge.

JUDGE STAFFORD: I don't think you answered my question.

MR. ZACK: Can I answer on behalf of the Senate, Your Honor?

JUDGE STAFFORD: Yes.

MR. ZACK: We don't have hundreds of races in Dade County. If we were going to input, it would be physically impossible in the economic environment we're talking about to input all of the races in every city and municipality in the state of Florida. When you have a Section 2 claim, you have—we talked about it in our last hearing, about a laser approach versus a scatter bomb, and we talked about we now understand what their com-

plaint is. Frankly, we had no idea there was going to be a Section 2 challenge in this [81] regard until the few days ago. The Supreme Court on May 13 invited any—said specifically that they retain jurisdiction for any Section 2 challenges, and no one filed one.

JUDGE HATCHETT: You have answered Judge Stafford's question. Do you have anything else to say, Mr. Peters?

MR. PETERS: The relative harm to them versus the rest of the state, I would suggest, is nil or slight given the fact for this Court to have a reasonable trial, if we lose, we lose, and have interim elections later to cure the problem. Today is the drop-dead date. It's over.

* * * *

[97] The last time, the last hearing that I stood in front of Your Honor I said, "Where is the Section 2 claim?" And silence from this side of the room. This is an effort to destroy the orderly electoral process that is about to begin. That is why in our last motion we asked the Court to consider deferring to the Supreme Court. As far as I'm aware, their invitation to consider these Section 2 claims is still there; that they are very familiar, all of these alternate plans have been submitted to the Florida Supreme Court. They have been fully briefed. And, respectfully, on the basis of the cases that we have cited in our brief on abstention, *Emerson*, most recently, *Jermono*, we would ask the Court to stay Section 2 proceedings and defer to the Florida Supreme Court. Thank you, Your Honor.

JUDGE HATCHETT: Mr. Cardenas?

MR. CARDENAS: Just very briefly, in the commentary on timing and preparation, Your Honor, if you will recall there is a very comprehensive order from this Court preparing us to commence trial on reapportionment, not only on the congressional, but the State House and Senate Districts.

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MOTION TO DISMISS HEARING

TR VOL. I

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[39] JUDGE HATCHETT: We are talking about the Voting Rights Act?

MR. ZACK: Yes, sir.

JUDGE HATCHETT: A right that was passed to rescue minorities from the whims of state legislatures and state voting procedure.

MR. ZACK: If there is a whim.

JUDGE HATCHETT: And to give those minorities immediate relief in a federal court.

MR. ZACK: When there is an immediate cause of action. We agree on both of those, Your Honor.

JUDGE HATCHETT: That's right. So it seems to me that you can't argue anything about state procedures to defeat [40] that jurisdiction. The state procedure was what the act was aimed at.

MR. ZACK: Only if state procedure violates the rights of the minorities. In this case it doesn't. It doesn't yet. And that's the key to the whole discussion, Your Honor.

JUDGE HATCHETT: If we were here today with an unconstitutional plan, would you argue that these plaintiffs do not have standing?

MR. ZACK: Absolutely not.

JUDGE HATCHETT: So your argument is that you're in a better position because you have no plan at all than you would be in if you had an unconstitutional plan?

MR. ZACK: No, Your Honor. My argument is that we will have a constitutional plan next Friday. That is my argument. And if we do not—

JUDGE HATCHETT: If the plaintiffs are suffering injury today, the Voting Rights Act gives them the right to relief today.

MR. ZACK: If you—

JUDGE HATCHETT: They don't want minorities to have to wait on state legislatures. That's why Congress passed the act.

MR. ZACK: If they are having—you are a hundred percent correct. If they are suffering a problem today, then [41] the issue is ripe and we are both saying the same thing. But what we are going to say to the court—

JUDGE HATCHETT: He agrees on the issue.

MR. ZACK: —we have no disagreement whatsoever. The question that the court has to decide, which we disagree on, is whether they are suffering an injury today.

JUDGE HATCHETT: All right. Now let's go to whether this court having jurisdiction should for some reason not exercise it.

MR. ZACK: First, the court has to decide whether there is an injury today.

JUDGE HATCHETT: That's right.

MR. ZACK: To determine whether it's ripeness.

JUDGE HATCHETT: That's right.

MR. ZACK: Then to decide whether or not they should set up a parallel track.

JUDGE HATCHETT: That's right.

MR. ZACK: We all agree on that.

JUDGE HATCHETT: If this court would begin taking evidence on drawing the plan, how would that interfere with anything that's taking place in the legislature, the Governor's office or the Supreme Court.

MR. ZACK: It would not, Your Honor.

JUDGE HATCHETT: That's right.

MR. ZACK: The question is whether this court [42] wants—

JUDGE HATCHETT: So, there is no reason for the court to abstain.

MR. ZACK: The issue—

JUDGE HATCHETT: In that aspect, it's good to stop any process from taking place. It's simply saying, head down the road with the plan.

MR. ZACK: And I'm not arguing that that should not occur, if there is no plan by next Friday. That's our only difference. If there is a plan—

JUDGE HATCHETT: So you're saying we should have stayed until next Friday?

* * * *

[43] If you find there is a present injury, I suggest, and I know the court will, rule that they are going to set up a parallel track. But don't get into a situation where there is no advantage and there is no injury shown which is their obligation to show. And that's what our motion to dismiss is geared toward.

With the limited time I have left, Judge Vinson, you asked the question about—the exact words were, no key role prescribed by law, whether there was a key role prescribed by law. There is no key role prescribed by law by the President of the Senate, for the President of the Senate, nor for

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[71] JUDGE HATCHETT: That motion is denied.

MR. ZACK: You wish us to proceed. Now that we've reached that point in these proceedings, Your Honor, we suggest to you that no discovery is necessary. The only thing that's necessary is to have a plan submitted and to have a special master look at those plans and have it decided at some point in time. So, we believe that the time that is taken here through discovery is not realistic and it is not necessary.

Moreover, Mr. Peters is going to address the various time frames that he thinks, if we are forced to comment on today, we wish to be our position.

Thank you, Your Honor.

JUDGE HATCHETT: Thank you, sir.

(Pause)

MR. PETERS: Thank you. On behalf of the House of Representatives.

A clarification. Is the court proceeding on a dual track with reference to both Congress and the House and Senate districts.

JUDGE HATCHETT: Yes. We don't know about a dual [72] track. We are doing what the Constitution says a federal court must do. If someone else is doing something, that's fine.

MR. PETERS: As I understand counsel and the court, it is not your purpose or intention to enjoin our process but to allow it to continue as state law.

JUDGE HATCHETT: There has been no prayer for this court to enjoin anything going on in the State of Florida.

MR. PETERS: With due respect—

JUDGE HATCHETT: We do not—if I can make it clear, we do not intend to enjoin anything, any process that is taking place, regarding elections in the State of Florida.

MR. PETERS: Speaking to the time frames proposed in plaintiffs' order, which I had not seen until five hours ago, with reference to the latter representation, respectfully, the legislature is in recess for the weekend. There are members meeting discussing this matter, the session is to continue on Tuesday for congressional. There will be another session perhaps as early as next week on state seats, perhaps. And the net effect of this order, particularly, given the suggestion of the discovery, respectfully, is just to disrupt, to destroy the ability of the state process to work. The courts have acknowledged this thing is a political process.

JUDGE HATCHETT: Evidently I'm not making myself clear. This court is not going to do anything regarding any [73] state process.

MR. PETERS: Indirectly, Judge, what I'm suggesting—

JUDGE HATCHETT: There are going to be no injunctions issued against any party to this lawsuit as a result of this hearing.

MR. PETERS: But what I am suggesting, Judge, is to enable—to allow particularly—and with this proposed deadline, an opposing political party, Republicans, to discover the Democratic leadership of state the legislature during a reapportionment session is to destroy the ability of that leadership, to coalitions, to do compromises, to have meetings with members in an attempt to get out of this mess we are in. If you allow them to depose the Speaker, the President, the Chairman, at the very time you're having to get the members to vote on plans, there will be no agreement. The process will self-destruct because of this court and the discovery.

JUDGE HATCHETT: You can't run a lawsuit without having discovery.

MR. PETERS: Yes, sir.

JUDGE HATCHETT: Discovery is part of a lawsuit.

MR. PETERS: Yes, sir. And people lose things as a result of discovery. You may be absolutely right, that the Republican Party would be able to discover something that is [74] happening within the Democratic structure.

JUDGE HATCHETT: Yes, sir.

MR. PETERS: And disrupt your process.

JUDGE HATCHETT: How else would you have a voting case in a federal court if no one could discover anything and it was a different trial than every other trial in the country?

MR. PETERS: Counsel just said something that is a ray of sunshine here, and the possibilities discussed last time. Counsel attempting get together by stipulations and agree to a lot of this stuff where there won't be the prospect of destroying our system.

Having said that, hoping that in each order you enter would allow us or require to attempt to stipulate, let me suggest deadlines. I understand I don't have a choice now. You're telling me to get you deadlines, is that right?

JUDGE HATCHETT: Yes. Ordinarily you don't get this opportunity.

MR. PETERS: I understand.

JUDGE HATCHETT: Ordinarily, the court just goes out and imposes deadlines.

MR. PETERS: I understand.

JUDGE HATCHETT: But the deadlines obviously are going to have to be so short in this case, if the case is going to move at all and have any effect, that we are [75] affording you the opportunity to talk about the deadline. So far, no one wants to do that.

MR. PETERS: I want to.

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TESTIMONY OF KIMBALL BRACE

TR. VOL. VI

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[176] MR. GREGORY: Your Honor. Excuse me, Your Honor. If we aren't—assuming for sake of discussion we're going to move into remedial stage, if that should be the Court's ruling, would we immediately move into that after the arguments tomorrow?

JUDGE HATCHETT: We would immediately move into whatever we have to move into, but, of course, the Court understands that sometimes you have to slow down an hour or so for everyone to regroup.

We're going to give ten minutes to the party in closing argument.

MR. GREGORY: Yes, sir.

JUDGE HATCHETT: You don't have to use it all.

MR. ZACK: If we do go into remedial stage, what do you think the time frames that we'de talking about, so we can [377] start understanding where the Court will be heading in that regard?

JUDGE HATCHETT: Well, as Judge Vinson says, it will be tight. We will give the counsel time to meet and discuss matters, however; work out any stipulations that they can. And then we'll go as quickly to that phase as we possibly can, if it's necessary.

MR. ZACK: If it's necessary.

JUDGE HATCHETT: If that phase is necessary.

MR. ZACK: We know it's hightly unlikely; however, we also recognize—what I'm trying to find out is it going to be a situation where the Court is going to set a time they're going to accept the plans and then there is going to be argument on those plans or is the Court just going to do what it's going to do?

JUDGE HATCHETT: Of course, we have not had a conference on all of this. It may be, if we get to the remedial stage, that the Court will direct the drafting of a plan.

MR. ZACK: Will direct a—

JUDGE HATCHETT: May draw a plan.

MR. ZACK: May draw itself a plan?

JUDGE HATCHETT: Yes.

MR. ZACK: Then nobody would submit plans at that point?

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TESTIMONY OF JAMES BURKE

TR VOL. VII

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[153] MR. ZACK: Your Honor, may the Senate be heard for one moment to respond to the issue of timeliness and prejudice, as specifically addressed by A and B, Rule 24?

As Mr. Dubbin stated, at least as I heard him state, his intervention is to the remedy stage. There would be no prejudice or timeliness question because we have not reached the intervention of the remedy stage of these proceedings, so if in fact there is no remedy stage it will be moot, and if in fact there is a remedy stage at that point he would be timely, would have pled in a timely manner.

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TESTIMONY OF MIGUEL DEGRANDY

TR VOL. II

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[162] Q Would you say based on the 1980 census data and compared to the 1990 census data where there has been an increase in Hispanic population in Dade County from 1980 to 1990?

A There has been a very significant increase.

[163] Q Okay. And has there been an increase or a decrease in the Anglo-American population in Dade County from 1980 to 1990?

A There has been a decrease in the Anglo population and the black population has remained almost stagnant, almost the same numbers.

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TESTIMONY OF MIGUEL DEGRANDY

TR VOL. IV

* * * *

[22] With that in mind, we then started by crafting the minority seats first and then crafting the rest of the plan. We had that theory actually throughout all of the state's plan. Our goal was to craft the minority seats first, and then draw the rest of the plan around it.

In doing that, we ascertained that the way to better do the minority districts in the Dade County area for the Hispanic community is to draw them north to south. Some of the plan—the current plan that we see today is drawn east to west, which severely impacts the Hispanic community. You see some of the seats that we sit in now are 89 percent Hispanic. By doing it the way we did it, all of our seats came within the ranges of 65 percent to 68 percent. Some of them came in, I think one or two over 70 percent just because the areas were so concentrated.

We did the same with the African-American communities in the northeast. We were able to draw one additional seat to that which exists today, and we took great pains to try to—

Q. Excuse me just a second. When you say you were able to draw one additional seat as compared to that which exists today, would you explain that a bit for us, please?

A. Well, right now you have the three representatives from the Dade County area. You have Darryl Reaves; you have

* * * *

[39] Q. Do you have personal knowledge, Mr. De Grandy, of discriminatory efforts to protect the white Anglo incumbent in the plan now described as the Florida plan?

A. Yes, sir.

Q. Would you describe that understanding and knowledge?

MR. PETERS: Objjection. They are claiming a Section 2 claim. It is not a Fourteenth or Fifteenth.

[40] JUDGE HATCHETT: I'm sorry. I can't hear you.

MR. PETERS: Objection, relevance. They're claim is a Section 2 claim. It is not a Fourteenth, Fifteenth Amendment claim.

MR. RUMBERGER: I'm not sure it really matters.

JUDGE HATCHETT: I'm still not sure I understand your objection.

MR. PETERS: I withdraw the objection, Judge.

JUDGE HATCHETT: Very well, it's withdrawn.

BY MR. RUMBERGER:

Q. Mr. De Grandy, do you recall the question?

A. Yes, sir. I do have knowledge.

Q. Can you respond to it, please?

A. Well, in our conversations with leadership and the people in leadership that were drafting the plans—

Q. Which would be who?

A. Which would be the committee chairmen like Mr. Burke, Mr. Deutsch, Mr. Cosgrove, who was vice president, Mr. Logan who was intimately within the leadership group on the redistricting process.

Q. This is the leadership of the defendant House, correct?

A. That's correct. It became very apparent to us that—

MR. PETERS: Objection to the extent that the witness is talking about "us" and "we."

THE WITNESS: To me, I'm sorry.

[41] MR. PETERS: The question is for his personal knowledge. To the extent he is testifying about others, it is hearsay.

JUDGE HATCHETT: He is going to talk about—we'll sustain it, but I think he is going to correct it and say as to him.

MR. RUMBERGER: Yes.

BY MR. RUMBERGER:

Q. As to you, Mr. De Grandy.

A. It became apparent to me that there were some people that had to be, from their eyes, protected at all costs. I had, for example, conversations with Mr. Logan in which—and some were heated and some were on the floor in debate—in which we—I was frustrated because we had demonstrated clearly that 11 could be drawn, and I said, "Look, we are drawing all the African-American seats that you want. Why can't we have equality for the Hispanic community?" Basically his response was that if we did it the way we did it, it would take out Elaine Bloom, and we would have to protect the speaker pro tem at all costs.

Q. All right, sir. Any other actual conversations with leadership or other information obtained from the leader-

ship which indicated that there was a movement or efforts to protect the white Anglo incumbents?

A. Conversations with Mr. Burke were of the same nature; [42] and, actually, the conversations with him were, he was more, "Well, don't worry about it. We can always fix that in court for you later on, but we have to take a political position, and we have to be good Democrats." Conversations that I have had with Mr. Bo Johnson indicate basically the same thing.

Q. All right. Thank you.

MR. RUMBERGER: No further questions at this time.

MR. VIGIL: The United States has no questions.

JUDGE HATCHETT: Mr. Peters.

CROSS-EXAMINATION

BY MR. PETERS:

Q. In the course of your answers you used the word "we," we did this and we did that. Who is the "we" that you are referring to?

A. When I say "we," I'm talking about, one, about Mario Diaz-Balart, who was as involved as I was in the process, and mainly the Hispanic Caucus.

* * * *

TESTIMONY OF WILLIAM DEGROVE

TR VOL. VII

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[11] Q What about the Hispanic population?

A The next panel down gives similar data for Hispanics. I do not have the data for 1950, but in 1960 you can see that we had in the state 70,195 Hispanics comprising only 1.4 percent of the state's population. 40.6 percent of these were native Floridians, and significantly, the largest group were living in Dade County

and the second largest group lived in Pinellas/Hillsborough.

As you follow the decades forward to 1960, the Hispanic population has grown dramatically. Its percentage of the state's total has now risen to 12.2, and the percent

* * * *

[13] A Yes.

Q That's actually on Page 8.

JUDGE VINSON: Got it.

MS. BUTLER: Okay.

BY MS. BUTLER:

Q Could you explain to the Court what this is?

A Yes, and I would like to use ink pen and paper to do this, if the Court would allow.

Q By the ink pen, do you mean chart that's—

A Magic marker.

Q May he do that?

JUDGE HATCHETT: Is it possible for him to give his ultimate conclusion without doing this?

MS. BUTLER: It certainly is, Your Honor, but there seems to be some question about whether this methodology actually produces results that are accurate, and if there's any question about that, I certainly want to explain.

BY MS. BUTLER:

Q Would you tell us what you ultimately conclude based on the chart that's here in the—what the purpose of the chart was that you were trying to deal with?

A What we are exploring here, if you'll read the written material on this chart, is the relationship between the percent of VAP, voting age population, in Dade County which is noncitizen. That—the relation of that variable to the [14] percent of the VAP that is Hispanic, and that's done by a bivariate regression model. And

what you see in front of you is the regression line. It's the best fit line to the census tracts in Dade County where the Y axis is the percent noncitizen.

* * * *

Q Before you—will you explain where the information came from that's going to go into this chart, where the actual numbers come from?

A The census bureau has released certain detailed data on magnetic tapes. Those are called summary tape files. The summary tape file 3-A—and let me explain that. The 3 indicates that that's detail data from the sample questionnaire. Every household receives a questionnaire. A proportion of households receive a detailed questionnaire. Detailed questionnaires ask very in-depth questions, and the questions we are trying to answer here are not asked of [15] everybody. That's what the 3 means that the data have been aggregated at the—no lower than the bloc group level. Bloc groups are 5- or 600 persons on average. They are the unit just below census tract, geographic unit.

* * * *

Q So your Y axis then, percent not citizen—

A What we are trying to relate here is the Y axis, which is percent noncitizen, to the X axis, which is percent VAP Hispanic. Both of these are VAP, let me underscore that. The census bureau has given us on this tape the percent of VAP who are citizens and who are not citizens. But they have not told us whether those people are Hispanic or whether they're Anglo or black or white. So—and they have told us, of course, the percent VAP—percent VAP Hispanic in all the census units.

So the statistics involved is to relate these two variables and attempt to extract some usable information from it. And we use bivariate regression to do this. And we—what we plot are the locations of the census tracts in [16] Dade County. For example, if there is a census tract that's 73 percent Hispanic and it's 43 percent non-

citizen, it would land right about here. (Indicating).

Then, as I believe testimony has been issued in the Court before, these data are fitted—these census tract coordinates are fitted with a least squares line. That means it's the best straight line that can go through the dots minimizing the distance squared of the dots from the line. That's why it's called the least squares line. Statisticians generally accept this—I'd say universally accept the least squares fit as the best linear model. Linear meaning we have fit the data with a straight line. There are other ways to fit the data.

JUDGE HATCHETT: Mr. DeGrove, we understand the methodology.

MS. BUTLER: Are you ready to be cross-examined on it, Your Honor?

JUDGE HATCHETT: No, we're ready for the next question.

BY MS. BUTLER:

Q You were about to tell us when you cross the 100 percent point this tells you the estimate of the line?

A Let me tell you the 100 percent line on up, the zero percent line, and you'll see that this least squares line intersects the two lines and it gives you two points of [17] major interest, and let me explain. The intersection at this point is the percent of those tracts with zero Hispanics who are noncitizens, and I found that this line intersected at about nine and a half percent, or .095, .95, nine and a half percent, indicating that if you have a track with no Hispanics in it, you would expect nine and a half percent noncitizens. As the line goes across to the 100 percent VAP Hispanic, the intersection point is about .55. If you can look on my chart, you will see that, and if you can follow across with your finger.

This represents, then, the—by 100 percent, a tract of all Hispanic persons, VAP, and the model implies that 55

percent—I didn't draw this exactly right—implies that 55 percent of them would be noncitizens.

Q Fifty-five percent of the Hispanic population in Dade County are not citizens according to this calculation?

A No. Fifty-five percent of the persons in a tract, which is 100 percent Hispanic, are not noncitizens.

Q From which you then assume what?

A Well, we—I examined an independent—a test of this. I was provided the census record by a colleague for the whole county in which you can calculate the percent of Hispanics in the entire county who are noncitizens. The colleague gave me the figure of 32—32 and a fraction percent.

[18] Q Let's make sure we clarify that. That's the percent of the total population VAP that is not a citizen, is that correct, 33 percent?

A I'm commenting on the Hispanic now, Hispanic VAP in Dade County, Hispanic VAP in Dade County. My colleague, who examined the census bureau record—there's a record for Dade County, a single record from which you can read directly VAP Hispanics and total noncitizens. You can do simple division and derive a figure. I did not do the work, but I would—I took the VAP Hispanic in Dade County, which we know to be 50 percent, and it's been introduced in evidence in this court. And if you take the 50 percent and project it up to the regression line I found, it crosses very close to 32 percent.

Q What that means then is that in precincts that are about 50 percent Hispanic, you're going to find 32 percent noncitizens?

A That's correct.

Q And 32 percent is the rate of noncitizenship for the entire county?

A It's the overall rate, yes, that's correct.

* * * *

[19] Q Mr. DeGrove, based on your analysis, what percentage of the Hispanic voting age population in Dade County are citizens?

A Based upon this analysis, it would be about 32 and a half percent—I'm sorry 32 and a half percent would be noncitizens.

Q Of the whole county now, let's just talk about the Hispanics. What percentage of the Hispanic VAP in Dade County are not citizens?

[20] A Are not citizens? About 32 and a half percent.

* * * *

Q Look at your 100 percent line and tell me what that figure is. Isn't this a percent of Hispanics in Dade County that are not citizens?

* * * *

THE WITNESS: The right-hand side of this line—It's early in the morning, I'm sorry—is a tract that is 100 percent Hispanic. In that tract, 55 percent of the VAP are noncitizens. The 32 percent is the average for the entire county.

Q I'll ask you again, see if we can't get this straight here. What percent of all the Hispanic citizens do you estimate from this are not citizens—Hispanic population, voting age, are not citizens?

A Fifty-five percent of Hispanic VAP are not citizens.

* * * *

[21] Q Again, doctor—Mr. DeGrove, this is the standard methodology by which you would estimate the percent noncitizens for the entire Hispanic population. Is that an accurate statement?

A I think so, yes.

* * * *

[25] A Well, you can see from this chart when a Hispanic district is about 66 percent, citizenship considerations reduce it to about 50 percent. So to the extent that De [26] Grandy plan has districts below 66 percent, they will be depreciated below 50 percent when you you correct for citizenship.

* * * *

[27] Q Would now like to turn to Joint Exhibit 3.

Q Mr. DeGrove, what does Joint Exhibit 3 demonstrate?

A This is a similar adjustment for Senate districts and it simply multiplies the citizenship rate for Hispanics, which is given at the bottom of the sheet, by the Hispanic VAP for the different plans, produces a new citizenship VAP for Hispanic, does the same for noncitizens, and produces a new percentage for the Senate proposed plans.

* * * *

[28] Q Mr. DeGrove, would you assume that the District 34 in the Florida plan was 66 percent Hispanic VAP. By the time it's been reduced for noncitizens, what is that ultimate percentage?

A Districts that are at 66 percent VAP Hispanic, when [29] corrected for citizenship, will reduce to about 50 percent.

Q The actual figure is 49.46 percent?

A Yes, it is.

* * * *

Q Mr. DeGrove, have you seen a census figure for total number of noncitizens in Dade County?

A Yes, I've seen that.

[30] Q And what is that figure and where did it come from?

A If came from the county summary record, Mr. Linc Clay in the Senate ran the data. And the record provides the total number of VAP Hispanics and the total number —I'm sorry, the record provides all the data for the county. It is the county record on the STF 3-A tape. And it's—the mathematical calculation has been done from the record and shows that 32 percent of the persons in Dade County are noncitizen.

Q Thirty-two percent without regard to—
A Without regard to ethnicity.
Q And does that figure correspond—corroborate your—
A Yes.
Q —regression estimate?
A Yes, yes.
Q And that's not an estimate in any fashion?
A No, the census record is actual count.

* * * *

[31] Q Going back to Joint Exhibit 1, the very last page of Joint Exhibit 1?
A Yes, I have it.
Q All right in about two sentences would you explain to the Court what this chart demonstrates?
A This is a simple chart of the mean housing value in Dade County for Hispanics heads of households and non-Hispanics heads of households, and also then in the bottom the Hispanic percent of the non-Hispanic. And it simply shows that Hispanic housing value is very close to non-Hispanic housing value. And housing value is a social substitute, frequently, for economic status. We do not have—the census tapes are not all out yet and this was available. [32] It, I think, indicates strongly that Hispanic persons in Dade County are not relatively deprived economically with respect to the non-Hispanic population.

* * * *

[38] Q So it's—in the nature of a county-wide figure, 55 percent. Fifty-five percent of the Date County Hispanics of voting age population are noncitizens, according to your data?
A Yes.
Q So you now have a county-wide figure, and based on the country-wide figure of non-citizen, you then calculate out for districts, and let's take that long chart here.
A Yes.

Q Which I beleive is marked as Joint Exhibit 2?
A Yes.
Q And you take the 55 percent county-wide figure and you apply that to every district?
A Yes, we did.
Q Under the Reaves/Brown/Hargrett plan that majority VAP Hispanic, and you apply it to all of the majority house districts under the Florida plan, and then you performed these calculations that are set out in this graph?
A Yes, we did.
Q But these districts are not county-wide Hispanics, are they?
[39] A They are a subset of the tracts from which the equation was derived.
Q And isn't it a fact that within the Hispanic population there are some tracts where there are higher levels of citizenship than there are in others?
A Certainly.
Q So it really is quite misleading, isn't it, Doctor, to take a county-wide figure and apply it?
MS. BUTLER: I object.
JUDGE HATCHETT: Objection overruled.

BY MR. HEBERT:

Q Is'nt it misleading to take a county-wide figure of noncitizenship rates for Hispanic and then use that figure knowing that noncitizenship rates vary among Hispanic citizens and apply it to every district as if they are the same level of noncitizens?
A No, I disagree. This equation is developed from the tracts, fairly small units. They are the tracts themselves which compose the districts in question. Some of these districts will be—on this table you mentioned, will be overestimated, and some will be underestimated. I don't purport that they will all be exactly as shown. Certainly Hispanic neighborhoods vary, but this is the Dade County average.

* * * *

[40] A No, let me tell you what I've assumed. I have divided that district into two pockets of persons, Hispanic persons and all other persons. I've treated that proposed district as though it were two pools. The regression line intercepts the two points, the zero intercept is for persons who are non-Hispanic, which is the .0956 calculated to be alien, and on the far right-hand side, the Hispanic pool intercepts at 55 percent. By treating the district as two pools, I made two separate calculations. And re-summed to get the new Hispanic VAP percentage as you see on column 3.

* * * *

[45] JUDGE VINSON: May I ask a question? Mr. DeGrove, on your standardized residual histogram—

THE WITNESS: That's the thing I mentioned just a moment ago, sir.

JUDGE VINSON: It appears to me that it is skewed [46] slightly, if you plotted it horizontally it would be skewed to the right. Is that a fair assumption?

A It's not perfect. It is—let me look at it.

MS. BUTLER: What page are you on, Your Honor?

JUDGE VINSON: Page 12.

THE WITNESS: It trails off to the left somewhat if you turn it sideways.

JUDGE VINSON: Well, for example on the negative side you don't have any points after 22—after 188. And you have—you have an extraordinarily large grouping right in the category from minus 130 and minus 75, correct?

THE WITNESS: There is a tail grouping on the left-hand side, that's the plus side. Do you see that?

JUDGE VINSON: Yes.

THE WITNESS: Yes, they are not a perfect normal distribution. For social research, I've seen much worse, sir.

JUDGE VINSON: Well, on your probability curve, the next page, 13, it's actually a general S curve, correct?

THE WITNESS: Yes, this is simply a cumulative plot of the previous one you've seen.

JUDGE VINSON: What does that mean in the middle portion where it's above the expected line?

THE WITNESS: The cumulative sum of the residuals has changed sign. Let me add, sir, I ran a nonlinear model [47] on the same data and it was no better. I ran a weighted regression model on the same data. It was a little poorer. If I can draw your attention to the statistics for the model, the multiple R, the R squareds, et cetera, and the standard errors, just about three pages back, these were—these measures were the best measures of the three models I ran.

JUDGE VINSON: Standard deviation on the outside is .9981.

THE WITNESS: Well, there are two standards errors given. The standard error for the regression coefficient, which produces this 55 percent estimate is .0236 or about two percent. The standard error for the constant term, which is the left edge of the chart, that would be the intercept at nine percent, that error is about 1.3 percent. So the mathematics gives us immediate estimates of the errors of the slope and intercept.

JUDGE VINSON: What I'm really concerned about is the middle—not the intercepts on the outside but the middle part of your line.

THE WITNESS: Yes .sir.

JUDGE VINSON: What is your error on that?

THE WITNESS: The standard error of the slope, which is .0236 in tihs kind of analysis minimizes at the mean of the X variable, so that .0236 applies at about the [48] 50 percent point. Can I go back to this chart a minute, sir?

JUDGE VINSON: Well—it's probably not worth that. I was just trying to see how closely it seems to fit in the middle once you draw the straight line. It seems to me that the middle is where the greatest error is lying.

THE WITNESS: No, sir, the greatest error is actually at the two ends. The competence limits of A regression line are slightly flared at each end. These are not sample

data, and statisticians will argue whether applying competence limits in these standard errors is even correct. I would support—I would say that might be beyond our limits here, sir.

JUDGE VINSON: What are your data points, so I know exactly what—what have you used when you plotted those data points? What is that—

THE WITNESS: Two hundred and sixty-four census tracts in Dade County, and the two data points are the percent VAP Hispanic and the percent VAP not citizen for the tract. The points—the scatter plot itself is not presented, only the residual plots, sir.

* * * *

[49] Q Mr. DeGrove, between using county-wide adjustments for citizenship and no adjustments whatsover, which is going to produce a more accurate picture of citizen VAP in these districts?

A I would say this analysis would.

Q Do you know what accounts for differences in citizen rates for the different census blocs or census tracts with the same level of Hispanic population? For example, I assume if we had a scatter plot up here we would see that at the 50 percent point there would be a range of dots?

A Yes, that's true.

Q Any idea about what accounts for that difference?

A Older Hispanic neighborhoods that are in the central part the ciay and settled would presumably have higher citizen levels. We had Nicaraguans immigrated into Florida recently, we have new arrivals every day. So these neighborhoods where the new arrivals live will have higher citizenship rates—or noncitizenship rates, excuse me.

* * * *

[52] JUDGE STAFFORD: My question is if you knew the confines of the district, could you have not calculated a more precise figure for each of these districts?

THE WITNESS: If we knew the confines of the districts, the census tracts specific to that district, we would run a regression model just for that district and we would develop a new line for that district. The sample size might be small and the line might be subject to some much large error. Yes, that could be done, sir. You could in fact do 11 regressions in Reaves/Brown/Hargrett and nine regressions for the State plan.

JUDGE STAFFORD: It's possible to do it?

THE WITNESS: Yes, it is.

JUDGE STAFFORD: Is there any reason why it wasn't done?

THE WITNESS: I think the smaller sample size would present statistical problems, yes, sir.

[53] JUDGE STAFFORD: Okay.

THE WITNESS: I also—you would have to aggregate—you have many tracts that are split. I'm not sure what we would do with those. That would take some work and judgment.

MS. BUTLER: How long would it take you to do that, Mr. De Grove?

JUDGE HATCHETT: The question is how long would it take you to do that, Mr. De Grove?

THE WITNESS: Me?

JUDGE HATCHETT: Well, how long would it take to do that?

THE WITNESS: We would need some statistical assistance and the computer and—two, three days.

JUDGE STAFFORD: Could you have done it since January?

THE WITNESS: I didn't have these districts since January, sir.

JUDGE STAFFORD: Okay.

THE WITNESS: The tape that I used has only been in the state a few weeks.

JUDGE STAFFORD: Okay, thank you.

JUDGE HATCHETT: Thank you, Mr. De Grove. If you'll call your next witness.

* * * *

[61] THE WITNESS: The way that's defined is the student or the parent would indicate on the registration form.

JUDGE STAFFORD: The school registration form.

THE WITNESS: Right.

JUDGE STAFFORD: That the child is Hispanic?

THE WITNESS: Is of Hispanic origin, yes. They have also, as of last year, began the process of identifying countries of origin. However they indicate whether or not they're black, non-Hispanic, white, non-Hispanic, Hispanic, Asian, specific islanders and others.

JUDGE STAFFORD: So a third or fourth generation child in Hillsborough County would be counted a Hispanic

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[153] MR. ZACK: Your Honor, may the Senate be heard for one moment to respond to the issue of timeliness and prejudice, as specifically addressed by A and B, Rule 24?

As Mr. Dubbin stated, at least as I heard him state, his intervention is to the remedy stage. There would be no prejudice or timeliness question because we have not reached the intervention of the remedy stage of these proceedings, so if in fact there is no remedy stage it will be moot, and if in fact there is a remedy stage at that point he would be timely, would have pled in a timely manner.

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[167] MR. ZACK: Yes, Your Honor, as the Senate, we, of course, adopt all relevant portions of the testimony of the House, that of Dr., Mr. De Grove, and all other exhibits that have been submitted on behalf of the House as Senate exhibits and Senate testimony in toto.

If that is acceptable to the Court we have succeeded in coming to where we want to be, and that is the end of the Senate case.

* * * *

[180] MR. CARDENAS: Your Honor, there are a number of issues that I believe have not been answered.

Number one, I don't think we have ever deviated from this court's previous ruling that this court was proceeding on the basis of voting age population.

I thought that there was significant argument regarding that matter, and that this court had made a ruling that bound all of us.

Subsequent to that there were, there was commentary relative to the issue of citizenship, but if Your Honor recalls specifically there are matters of evidence, however specifically deemed nonadmissible because of Your Honor's previous ruling.

This court has consistently taken a position [181] regarding VAP, contrary to what Mr. Zack is now trying to allude, and the issue of citizenship was brought in as to, as an afterthought complimentary process, but certainly not to convince this court to change its ruling on the matter.

All that we are doing here on a very minute issue of this litigation is to provide this court with our sides perspective on those matters which were testified to regarding without in any way, shape or form deviating from the previous rulings of this court regarding the mandate or voting age population.

And furthermore, Your Honor, regarding that particular item, to give one full day on a four-day compact trial to a minute issue that has been dealt with and all we are offering is not all we are offering is rebuttal evidence because of Dr. Lichtman's absence in my opinion, respectfully, Your Honor does not warrant reopening a process for a full day on an issue which is not deserving 10 percent of the Court's time in view of the whole process.

JUDGE HATCHETT: There is abundant evidence in the record regarding citizenship. We would expect the parties to argue citizenship versus the VAP at the appropriate time.

Now, is there anything else we need to take up [182] before we break?

* * * *

TESTIMONY OF JOHN GUTHRIE

TR VOL. IV

* * * *

[150] Q Mr. Gutherie, would you advise the Court what your roll was in the reapportionment process this year?

A I was Staff Director of the Senate Committee on Reapportionment.

* * * *

[152] A Yes. I was asked by this Court in the Congressional hearing to assist Mr. David Gelfand in the preparation of the Congressional map that was ultimately adopted by this Court. And, in fact, spent hours with Mr. Rose, his assistant, and Mr. Gelfand in putting that map together.

I also was asked by the Florida Supreme Court to assist them with preparation of the map which was finally adopted by them and we see before us as the Florida plan.

Q How many plans were developed using the Senate redistricting system?

A More than three thousand plans have been generated during this process, three hundred of which were submitted to a final process of producing maps and statistics, a hundred of which—a hundred legislative plans of which were introduced for formal consideration by the legislature.

* * * *

[157] THE WITNESS: A different approach is taken with plan 180. The two majority seats, in that instance, are in Dade County and in Broward County. The second district coming out of Dade County, in order to get sufficient numerosity for an African-American voting age majority seat must extend all the way into the Fort Lauderdale area. Fort Lauderdale, in the Florida plan, or Fort Lauderdale and the adjoining communities to the north constitute two thirds of the majority African-American VAP district in the Florida plan.

Because this large concentrated population in downtown Fort Lauderdale is not available for a further access seat or majority society north of Dade County, what plan 180 has to do in order to accomplish that end is string a district, as we discussed earlier, district 28, going from Pompano Beach north [158] to Vero Beach in Indian River County and west to Fort Myers on the Gulf Coast.

* * * *

Q Now, would you do the same analysis, if you will, with the De Grandy plan.

A The De Grandy plan is similar to the Hargrett, Reaves and Brown plan—in fact, it might be easiest at this point to put the two of them together—in their approach to South Florida. As has been discussed, the district 35 in the De Grandy plan has a 55 percent Hispanic voting age majority.

Q Thta's the one that takes in Miami Beach?

A South Beach, as well as the Little' Havana area and actually the Windwood area, Windwood, South Beach and Little Havana.

Q Were you here for Dr. Moreno's testimony?

A I was.

Q Is that the area that he referred to in Miami Beach that had the new arrivals, Hispanic arrivals?

[159] A Yes, it is.

Q Thank you. Continue, please.

A Also, parenthetically on that point, I, like Mr. Hoffeler, have spent countless hours—I can even almost quantify it—I mean literally hundreds of hours in front of a computer screen during the past several months since we have been developing Congressional, Senate and House of Representatives plans.

And one of the things I have discovered, the technology that we employ enabies you for each tract or block or whatever unit of geography you're looking at to indicate the numbers of persons broken down into racial categories, also to indicate or the machine will also indicate to you

the percentage of those persons who are registered voters or who are voting age populations.

And one of the observations, stunning—striking observations that I made early on using the Census data were that the areas just south of the Miami River and just north of the Miami River, near the bay in Dade County, have exceptionally low registration counts. Registration in the range of 12 percent to 15 percent was common in that area.

Q That's the area that constitutes the lowest 62 percent, I believe it was, or 61 percent? Would you look at your statistics?

A Fifty-five percent African-American VAP.

* * * *

[160] THE WITNESS: District 35 in the De Grandy plan has a 55 percent Hispanic voting age population.

Q And in district No. 35 in HR&B?

A In HR&B, I believe it's 65.7 percent. The notes that I have here are documents that have been submitted to the Court. And I went ahead and assembled those in notebook form so that I could less clumsily and hopefully speed this along a little bit in answering such questions.

District 35 in the Hargrett, Reaves and Brown plan is 65.7 percent African-American—or Hispanic voting age population.

Q And that's the area that has twelve percent registration?

A Significant numbers of tracts within that district have registration levels that low, yes.

* * * *

[161] Q So, in order to create the problematic, as Dr. Moreno's words are—fourth Hispanic seat, you need to go through these machinations and the ripple effect is as you describe it to this Court?

* * * *

Q To create the fourth problematic seat, Hispanic, have you explained the ripple effect in both Hargrett, Reaves and Brown and De Grandy?

[162] MR. HEBERT: I object to the form of that question as well, Your Honor. There are a number of different ways to draw districts in South Florida. And simply to assume that a fourth district has to be a problematic seat when there is testimony also from other witnesses that says it isn't a problematic, in fact, a great weight of the evidence.

MR. ZACK: I'll withdraw the word "problematic." The Court can decide for itself.

* * * *

[163] A I have seen no plans that have four Hispanic majority seats and three VAP majority seats and three African—two African-American majority VAP seats and an African-American access seat in South Florida which does not result in a configuration for one of the African-American seats.

JUDGE VINSON: You stopped in mid answer and started. Would you say that answer again, start to finish?

THE WITNESS: Okay. I am aware of no plans that have been—I am aware of no plans that have been proposed either during the legislative process or the subsequent legal proceedings which provide four majority VAP Hispanic seats—and in most cases with the Hispanic seats, a prior testimony has indicated, persons are looking for a super majority because [164] of the problems with citizenship and lower registration rates—four Hispanic majority seats, two African-American majority seats and a third African-American access seat in South Florida, which does not result in seats similar to district 28 or a district similar to district 28 in the Hargrett, Reaves and Brown plan or district 24 in the De Grandy plan.

BY MR. ZACK:

Q And to make sure it's perfectly clear, the Hispanic VAP's, you're talking about super majority that will in fact elect a Hispanic is what you are looking at and you haven't been able to find one?

A Yeah. I'm really not qualified to testify as to the effectiveness.

Q I just want to make sure that we're clear. Now, in both HR&B and De Grandy, they both eliminate district 40 in the way that the Senate plan had it; isn't that correct? They both have the No. 40. What is the difference between the No. 40 in their plans as compared to the Senate plan?

A Well, the particular No. 40 in both those plans are districts which are based in Hialeah, which would likely elect a Hispanic, which have Hispanic super majority VAP percentages.

* * * *

[167] BY MR. ZACK:

Q Would you walk the Court through those maps, please? First of all, what is the object that you are holding in your hand?

A The point of this was to provide an easy reference as to a scale of miles, so we can get a sense of what we're talking about. So the length of this ruler here on the map here is 20 miles. Okay. That's just to put—

Q That's in five-mile segments?

A Correct. The first plan is the Florida plan here in 267. And what this map provides is a street-level or block-level detail of how the districts in that plan—what the district in that plan look like. A lot of times when you reduce these maps to a eight-and-a-half-by-eleven sheet of paper or even to a thirty-six by thirty-six map, some of the detail as to how the districts are designed is lost.

So, what you see is that the Senate plan starting in Monroe County has a district which comes up through

the Florida City, Richmond Heights, Homestead area and then up west of Cutler Ridge, along a fairly narrow path of US1 and into the Overtown/Liberty City area. That district, as I described it earlier, is a 35.5 percent African-American majority district.

Q That's 40; right?

A That's correct. And then the other, it also has district 34 here in the green, which is a Hispanic-American majority district. The percentage on district 34 is 66.3 percent [168] Hispanic VAP.

District 37, including Kendall Lakes, Westchester and most of the areas in southwest Dade County, is 64.3 percent Hispanic voting age population. And district 39, which is based in Hialeah, also includes Miami Gardens and areas to the west, is a 76.1 percent Hispanic majority district.

On this chart here, on the chart for the HR&B plan or Senate plan 180, you see, as we discussed on the smaller map, how district 36 was composed. Again, as in the Senate map, it includes the Florida City area, up through Homestead and Richmond Heights, then a very narrow path along US 1—in some places the distance between US 1 and the railroad track—up through the south part of Dade County, through Coral Gables and just east of the airport, down the Miami River and finally into the Overtown or Liberty City area.

Q Can you tell the Court how many miles we're talking about then, that is basically with US 1? Fifteen?

A Well, the thin path there would be, yes, approximately fifteen miles linear. From the—

Q If you drove through the district with both doors open, you would kill people on both sides of the straight; is that a fair way of describing it?

A I guess you could say that.

Q Go ahead and continue describing it.

A Another point I guess you could make about this map: The [169] district 35 in the Hargrett, Reaves and Brown plan, we have already discussed, is a 65 and a

fraction Hispanic voting age percentage district. The way that they are—that that is accomplished is by including the Hispanic persons in the South Beach area, the west side of Miami Beach. Actually, this is Collins Avenue along here. And the property east of Collins Avenue, for a stretch of approximately five miles, is in district 38, which would be an Anglo district. The territory west of Collins Avenue on Miami Beach is in district 35. But district 35, as I explained, is a Hispanic majority district, as is district 34, district 40 and district 33.

District 32, as you see, begins in the Opa-Locka area; actually, Opa-Locka is divided by district 32. It includes the neighborhoods in north Miami Beach and then goes up into south Fort Lauderdale. Actually, these particular tracts here do not include very many African-American persons. There is a concentration of African-American voters in the Cutler Ridge's area and also in west Dania and Hallandale. But there are large numbers of white persons included in this district. Then it comes up into Fort Lauderdale.

Q Show us what 28 does, the one that you described before. And now you're talking about this plan, 180; isn't that correct?

A That's correct.

Q Which is—

[170] A Which is the Hargrett, HR&B plan.

Q Okay.

A District 28 begins in Fort Lauderdale here, north Fort Lauderdale, progresses through Pompano Beach. Let me take that back. It begins in the Pompano Beach area, proceeds north into Delray Beach in Palm Beach County and, again, up—on a narrow path—up through Palm Beach County into West Palm Beach, west—once you get to the city of West Palm Beach, the district proceeds west and from there into the Everglades agricultural area and then north into Fort—I believe ultimately ending in—ultimately ending in Indian River, Vero Beach.

Q All right. Just so that it's put in proper perspective, that is this pink district that you describe?

A Pink district, 28, yes.

Q And it goes all through that pink area all the way over here; is that correct?

A Goes west to Fort Myers; yes.

Q Okay. And going back to—well, first of all, on this one, you have your coastal communities where one side of the street is in district 31 and the rest is in—the other side of the street is in 28; is that correct?

A That's correct.

Q And which runs how many miles?

A Oh, golly. I've never measured the distance.

[171] Q Well, do it for us.

A From—

Q Another ten?

A Yeah.

Q So, twenty, plus seven and a half, plus ten; thirty-seven and a half miles; is that correct?

A Based on our quick calculation here.

Q Okay. Now, sir, would you show us and walk us through 275, which is the De Grandy plan; is that correct?

A That's correct. And it's a very similar approach, as I discussed earlier. You have got an African-American majority seat containing areas of—this one actually goes into north Miami, south through Liberty City and Overtown and then along a narrow, narrow path—this one picks up the black—what's referred to as the Black Grove or the predominantly black area in Coconut Grove—in the Hargrett, Reaves and Brown, I believe that that area was bypassed; yeah, it was—and then south into Richmond Heights, Homestead and Florida City.

Q That's what you described previously as approximately a fifteen-mile stretch on the HR&B plan; is that approximate?

A That would be correct, yes.

* * * *

[177] A That's correct. And there are significant areas, primarily Windwood, Allapattah, the area south of Opa-locka, Opa-locka itself and northwest Dade County where you have large numbers of both or large proportions of both Hispanic and African-American persons.

* * * *

[179] And the—what's interesting about this map, if I could put the Florida plan back on the easel here: What you see in the Overtown, Liberty City, Windwood area is that most of that territory, most of those people, are included either in the African-American access district or —which is district 40—or in the African-American majority VAP district, district 36.

In the plan 180, what we find is that large numbers of these persons in mixed neighborhoods, in Windwood, Overtown—Windwood and Allapattah, primarily, are in the Hispanic district, district 35.

* * * *

[180] A The same thing occurs, by the way, in the area I referred to earlier south of the Opa-Locka Industrial park. In plan—in the Florida plan, district 36 includes that mixed neighborhood. In the Hargrett, HR&B plan, that area is included in a Hispanic district.

Q That is this purple area here (Indicating)?

A It's tract number 9.01 and 9.02, portions of those two tracts.

Q Okay. So, those Hispanic voters, which are approximately what percentage in each of those districts—black voters? Excuse me.

Tell us the percentage of black and Hispanic voters in each of those districts

A Oh, in the districts.

Q The ones that you just menitoned.

A The tracts, the two tracts?

Q Yes, sir.

A Okay. Okay. Track 9.01 is 26 percent African-American and 69 percent Hispanic voting age. Track

9.02 is 50 percent African-American and 47.8 percent Hispanic. Between the two of them, it's about thirteen thousand six hundred people.

Q And in the Senate plan, this purple, No. 40, is part of—this is part of No. 40, which you identified previously?

A Those two tracts actually are in district 36, yes.

Q Okay, good.

* * * *

[182] Q —how De Grandy did the same thing? Would you explain to the Court exactly what that shows?

A I don't want to take a whole lot of the Court's time.

Q Don't be repetitious. Just tell us to the extent that it's the same, just say it's the same and to the extent that there is any difference at all, tell the Court what it is.

A Well, in both instances—in both instances, the concentration of African-Americans known as the Black Gables is left out of the south district. In the De Grandy plan, the area known as the Black Grove is included. In the Hargrett, Reaves and Brown plan, the Black Grove is excluded from the African-American majority VAP district.

The two plans indicate similar—and, here again, the mixed neighborhoods of Windwood, Allapattah, south of Opa-Locka and northwest Dade County, are put into the Hispanic district [183] instead of being put into the African-American district. The reason they do that is that there are, presumably, is that because there are a limited number of Hispanic persons in Dade County. And in order to accomplish super majority in more than three districts, they took the approach of putting the mixed areas into the Hispanic districts instead of putting them into African-American districts.

Q What does the Senate plan do?

A The Senate plan puts those mixed areas, by and large, into African-American districts. Again, the statis-

tics, the overall statistics for Dade County is that seven percent, in the Senate plan, seven percent of the non-Hispanic blacks who live/reside in Dade County are voting age population, are in a Hispanic district; with the HR&B plan, it is twenty percent; for the De Grandy plan, it is twenty-three percent.

Another interesting point is that white, non-Hispanic white persons in all three of the plans are being left out, if you will, or—I want to be careful to keep my comments factual here. In the Florida plan, 52 percent of the non-Hispanic white voting age population is in a Hispanic or an African-American majority district. In the Hargrett plan, that number is 70 percent. In the De Grandy plan, the number of non-Hispanic whites in Hispanic or black districts is 72 percent.

* * * *

[185] A We touched on this earlier in describing the ripple effect. The fact that this—the choices made in both the De Grandy plan and the Hargrett, Reaves and Brown plan to include African-American, the mixed African-American Hispanic communities in Hispanic districts, together with the—in the case of the Hargrett, Reaves and Brown plan, the higher African-American VAP majorities that were achieved in South Florida result in the population in Fort Lauderdale needing to be used in order to create the second district in Dade County.

In both instances, the Broward County portion of that district is, I believe, two-thirds. The district is two-thirds in—well, actually, for the De Grandy plan district, 32 is two-thirds in Broward County and one-third in Dade County. It's a 57.1 percent African-American VAP.

In the Hargrett plan, district 32 is approximately 45 [186] percent in Broward County, 55 percent in Dade County. It has an African-American VAP of 58.8 percent.

Because the Fort Lauderdale area is not available for a district as it is in the Florida plan going from Fort Lauderdale to West Palm Beach, including just those two urban centers, in order to create a third access African-

American district, it is necessary to—in order to get the numerosity that you need for a third African-American access district to go in one case to Melbourne, in another case to Vero Beach and west to Fort Myers.

And that's not to say that this is the only way of solving the puzzle, if you will. The suggestion is that you can only count—first, in redistricting one of the fundamental rules, you can only count persons once. If you count them—if you include a person in one African-American district or one Hispanic district, be that person white, black, Hispanic or whatever, you cannot use that person again.

* * * *

[191] JUDGE HATCHETT: You may have answered this at least once but I want to make sure. Out of all of the plans that you viewed, did you view any plan that drew VAP majority black districts solely within Date County, more than one VAP black [192] district solely within Dade County?

MR. ZACK: Your Honor, the question has to—I mean, respectfully, has to ask and four Hispanic districts. You understand? You can do anything if you don't have to worry about anybody else. So, I think the Court wants—

JUDGE HATCHETT: I asked him did he see such a plan.

THE WITNESS: I don't recall—

MR. ZACK: I just—

THE WITNESS: I don't recall having seen any such plan. The plan that was—do we want to just have a conversation here?

MR. ZACK: That's what it is. Just tell the Court what you know.

JUDGE HATCHETT: Yes, go ahead.

THE WITNESS: The plan that was proffered by the NAACP earlier in this proceeding has two African-American VAP majority districts, which are mostly in Dade County. One of them extends into the Cutler Ridge

area in south Broward, but it does not extend up as far as Dania or I don't believe it gets into Dania. I'm sure that it does not go into the urban center of Fort Lauderdale.

BY MR. ZACK:

Q Does that map have only three Hispanic super majority seats?

A Yes.

[193] MR. ZACK: Thank you.

JUDGE HATCHETT: Thank you.

JUDGE STAFFORD: Now, Mr. Zack posed a question. Following up with what Judge Hatchett asked you: Have you seen any plan that creates four Hispanic VAP, not necessarily super majority, but four VAP's expanding district solely within Dade County?

THE WITNESS: Both the De Grandy plan and the Hargrett, Reaves and Brown plan include territory in Broward County in order to fill out their Hispanic district. So, I can't recall having seen one that has four Hispanic majority. Without saying whether it could be done or not, I have not seen it.

JUDGE STAFFORD: On those that got into Broward County, did they also include two black or African-American VAP, majority districts, in the same area?

THE WITNESS: Okay. The Hargrett, Reaves and Brown plan has one African-American VAP majority district wholly contained in Dade County. It has a second one which extends north into Fort Lauderdale, as I said earlier.

JUDGE STAFFORD: Yes, sir. Thank you.

THE WITNESS: Also, the De Grandy plan, the second Hispanic district extends north to Fort Lauderdale.

JUDGE STAFFORD: Thank you.

MR. ZACK: And the percentages of Fort Lauderdale?

[194] THE WITNESS: In the case of the Hargrett, Reaves and Brown plan—

MR. RUMBERGER: Judge, that's repetitious. We have been over that a number of times.

JUDGE STAFFORD: I think I—

MR. RUMBERGER: Two-third, one-third, forty-four percent on the other.

JUDGE STAFFORD: I think I asked him some questions. My apologies to my brethren here.

JUDGE HATCHETT: Well, this one may be repetitive, also.

MR. ZACK: Did you say he may answer?

JUDGE STAFFORD: I think I've got it.

MR. ZACK: You've got the answer; fine.

JUDGE HATCHETT: Yes, he has the answer. I have a question, though. From all of your experience working in South Florida, is it possible to draw four VAP majority Hispanic districts and three majority black districts?

MR. ZACK: Your Honor, may—it has to be—I want—the Court is asking for VAP, I'm sure; right?

JUDGE HATCHETT: Yes.

MR. ZACK: And there is no question—well, you want—the question of electable black Hispanic seats or not? You answer the question as you understand it.

THE WITNESS: It's amazing, Your Honor, what you can [195] do with these computers. And I'm not aware that any such plan has been submitted either to this Court or in any other legal proceeding or during the legislative process which did that.

If you ask me would I believe that you could do it, I would believe that. But it gets to the notion of—because of numerosity—of how thin you're willing to cut your margins on both the African-American and the Hispanic seats, cutting them down to a bare VAP majority in order to accompilsh that.

JUDGE HATCHETT: You've answered my question.

* * * *

[196] JUDGE HATCHETT: Overruled.

BY MR. ZACK:

Q Please answer that.

A Wholly in Dade County, I do not believe it's possible, no.

Q And even doing, going a little bit into Broward, you couldn't go and get four sixty-five percent seats?

MR. RUMBERGER: Objection; leading.

BY MR. ZACK:

Q And two black VAP's; isn't that correct?

MR. RUMBERGER: Objection; leading.

JUDGE HATCHETT: Overruled.

BY MR. ZACK:

Q Answer the question.

A No, I don't believe you could; no.

* * * *

CROSS EXAMINATION

BY MR. BURR:

Q Mr. Guthrie, is it a fair statement that in attempting to [197] accommodate the interest of Hispanics and blacks in Dade County in drawing Senate districts, that there is a ripple effect northward at least into Broward and Palm Beach Counties?

A I would like to answer it—yes, and I would like to answer the question this way: That the Florida plan provides two majority African-American districts in Dade, Broward and Palm Beach Counties and a second African or a two majority VAP, a third district which has a 35.5 percent African-American VAP in an area where we have seen—we have a record of crossover voting that would enable an African-American candidate of choice to win election.

That district, by the way is in the vicinity of—let me give it to you exactly. That district is—

JUDGE HATCHETT: 40; right?

THE WITNESS: It's district No. 40. I'm looking up the Hispanic VAP on that district. It's 22.9, but, as I testified earlier, there was testimony at the south Dade public hearing that the Hispanic-American community in South Florida saw itself as being more closely aligned with the African-American community than with the downtown or the urban Hispanic community.

So, if you want to maintain that level of African-American representation or opportunity in South Florida, it will be necessary if you create four Hispanic districts to push one—to create an additional African-American district that [198] goes beyond, I believe, what's on this.

* * * *

Q All right. Now, focusing on those three counties—Dade, Broward and Palm Beach—I would like to ask you first a question about Reaves, Brown and Hargrett.

A Okay.

Q Now, in the Reaves/Brown/Hargrett plan, how many black districts are there that are located either wholly or in part within those three counties?

A Two, two African-American majority VAP districts.

Q And another—okay. And another black access seat that is located partially in Palm Beach and partly outside Palm Beach; [199] correct?

A Mostly outside, I think, yeah.

Q Now, is that also true with the De Grandy plan?

A With the Hargrett, Reaves and Brown plan, the access seat, it's a 47.1 percent African-American VAP district. And it extends through nine counties. Okay. The Palm Beach portion of that district is—well, I misspoke. One hundred and seventy-five thousand total—one hundred and twenty-six thousand of two hundred and twenty-eight VAP is in Palm Beach.

For the De Grandy plan, district 24 is 35.2 percent African-American VAP. It extends north to Brevard

County, crossing seven counties all together. And the Palm Beach portion of district 24 is—it's one hundred and sixty-four thousand VAP out of two hundred and thirty seven total VAP in that district.

Q Okay. So, what we have in both plans, we have two black—two seats that have at least 50 percent or greater black VAP in Dade and Broward Counties and we have a third influence black seat or an access seat that covers a large number of counties, a substantial number of counties, six, seven, eight or nine counties?

A Seven or nine counties.

Q Seven or nine counties; isn't that correct?

A Yes.

Q Okay. Now, if there is not—

[200] A I'm listening. I was checking my seven and nine. That is correct.

Q Now, if a fourth Hispanic seat is not created in Dade County, is it not possible to create three black districts in Dade, Broward and Palm Beach Counties exclusively contained within those counties that have a 50 percent or greater black VAP?

A I am not aware of—well, let me think.

Q Is that not exactly what was done in the plan that was tendered to the Court yesterday referred to as the Burke/Wallace plan?

MR. RUMBERGER: It was not admitted, as I recall, and to which we continue our objection.

JUDGE HATCHETT: We note your objection, Mr. Rumberger. Overruled.

BY MR. BURR:

Q Do you want me to ask the question again?

A I understand the question now. The plan that was tendered to the Court had two African-American majority VAP districts which extended north into Broward County to include the Cutler Ridge area. They did not include the urban Fort Launderdale area.

Q And they were both 50 percent or greater black VAP; correct?

A That is correct.

* * * *

[201] MR. ZACK: I just make an objection for the record that we're now talking about plans outside of Dade County that go all the way to Palm Beach County. I believe that that is not what this—this is a Section 2 matter as to Dade County. So, anything beyond what can be done in Dade County I would object to.

JUDGE HATCHETT: Overruled.

* * * *

[206] MR. HEBERT: That's correct. I did not. And I was going to go back and amend it. Fortunately, I have co-counsel here who are quick to remind me when I make mistakes.

BY MR. HEBERT:

Q If you were told that your instructions from the Court, from your Senate bosses, whoever were to instruct you, to revise the Senate plan to create let's start out with four districts where Hispanics are in the voting age population majority and three districts in which blacks were in a voting age population majority, how long would it take you to draw such a plan?

MR. ZACK: I have no problem with the question if it's confined to Dade County or a specific geographic location. Otherwise, we have no idea what the answer means.

JUDGE HATCHETT: Overruled.

MR. HEBERT: And I don't want you to limit your answer to the population in Dade County. We're talking about South Florida. And by South Florida, I'm going to refer to an area from Fort Lauderdale south as my geographic reference.

MR. ZACK: And, just for the record, I know you want to have this question answered but I need to object

on the basis that this is a Section 2 case involving Dade County. There has been no testimony about communities of interest or [207] any matters concerning polarity, polarization, no polarization testimony, no bloc voting testimony concerning Broward County.

So, for the record I want it to be very clear that this Court cannot go into the Broward County without having the Court finding information which was not provided during the plaintiffs' case in chief.

JUDGE HATCHETT: Overruled.

BY MR. HEBERT:

Q How long would it take, based on your experience, I think you said three thousand plans were drawn on the computers for the Senate?

A Yes. You want to start in Fort Launderdale and include all of Dade and Monroe?

Q No, I didn't say anything about starting anywhere, Mr. Gutherie. I was asking you how long it would take, using Fort Lauderdale as your starting point in Florida and taking every area south of that, including that area. If you were told by the Court draw four Hispanic VAP majority districts and three African-American majority VAP districts, how long on your computer would it take you and your Senate staff to do that?

A The first thing I would advise the Court is that it may be impossible to accomplish that task in any amount of time.

Q How long would it take you to find out whether it was possible or impossible? How long would it take you to generate [208] the maps and the statistics?

A Addressing—that's a—I don't know. I honestly don't know.

* * * *

[209] Q Now, what was the shortest amount of time, the shortest amount of time it ever took you to respond to one of those "what if" questions.

MR. ZACK: Objection, Your Honor. What if what? What if the sky is going to fall down in the next minute and a half, hopefuly a second and a half?

MR. HEBERT: I was trying to use his term.

JUDGE HATCHETT: Overruled.

THE WITNESS: Okay. I can't recall what the easiest "what if" postulate that was ever proposed to me was.

JUDGE HATCHETT: That's fine. You've answered the question.

THE WITNESS: Yes.

I can say that the issue of is it possible to draw four Hispanic VAP majority and three African-American VAP majority districts in South Florida, that is a very difficult question. It's a difficult "what if" postulate because of the [210] complexity of the demography of South Florida. It's not something that I can sit here and just opine. It's something, frankly, that I have given some thought to. And my—I don't have a sense of it at all. My expectation is that it would be very difficult to do that.

JUDGE VINSON: Mr. Guthrie, I'm inferring from your answer that the answer is no within the bounds of reasonable expectations of districts? Is that a fair inference to draw from what you're saying?

THE WITNESS: What I have done, Judge Vinson, from the plans that have been placed before the legislature—and many people have been working on these plans for many months now. And I've got to believe—with several different theories about what we ought to accomplish in redistricting.

And the plans that are before the Court, I think they're responsive to say that that's the best we have got along the way. And nobody yet has accomplished that. Okay. Nobody yet has proposed a plan which has four majority African-American—four majority Hispanic-American VAP districts which they believe—which, and, again, normally map makers are shooting for a super majority VAP with the Hispanic districts and three African-American VAP districts in South Florida.

JUDGE VINSON: Have you tried to do it?

THE WITNESS: Have I tried to do it? No.

[211] JUDGE VINSON: Okay.

JUDGE STAFFORD: Mr. Hebert, let me ask you: Does that question presuppose a ten-percent deviation or are you back to his confine of .4 percent?

MR. HEBERT: I haven't actually focused on the deviation. And the question really could have taken into account either scenario. And maybe I should amend my question and say—if we were to—and I think it's a proper—perhaps he's limiting himself because of the .4 percent instead of being willing to enlarge that.

BY MR. HEBERT:

Q Would your answer make a difference if the deviation were permitted to be as high as eight or nine percent?

A It's an empirical question. And I'm reluctant to guess as to what the answer is.

Q And how many hundreds of hours did you say that you worked on the computers?

All right. Let me see if I can make the question a little easier for you. Again, using the geographical confines of Fort Lauderdale south as the point of reference, how long would it take you, Mr. Guthrie, to draw four Hispanic districts, two black voting age population majority districts, two majority black voting age, four Hispanic population, voting age population, and one what you term black access district? Could that be done faster than drawing three majority black [212] districts? How long would it take you? That's all I'm asking.

A I do not believe that—

Q Assuming it can be done. I'll even concede that. Assuming it's possible to do it, how long does the computer take in your office to draw such a district if this Court orders you to go back to your office and see how long it takes? Give us an estimate of how long that would take you.

A The answer—I think we're trying to make redistricting into a bit easier a process or working on the computers into a bit easier process than I in fact believe it is. Because of the—because the concentrations as indicated by the black and Hispanic maps that we have here, because all of the black citizens or persons don't live within the same area and all of the Hispanic persons don't live in exactly the same area and because when they do live in those areas, in order to avoid getting a very large VAP majority it is necessary to include some outlying areas, what is required oftentimes is actually going in at the block level and making decisions block by block of, okay, how many black persons are in this Census block, how many Hispanic persons are in this Census block. And in terms of the total equation involving three hundred thousand Census blocks, am I going to get a better result if I put this Census block in district A or district B. And the best example is a tract or block which has 40 percent Hispanic VAP.

JUDGE STAFFORD: But all this—

[213] THE WITNESS: Excuse me.

JUDGE STAFFORD: But all of this information is already in your computer; isn't it?

THE WITNESS: It's in the computer.

JUDGE STAFFORD: All you have to do is bring it up?

THE WITNESS: Yes.

BY MR. HEBERT:

Q When was the last time you ever worked on—

JUDGE VINSON: Wait.

MR. HEBERT: I'm sorry.

JUDGE VINSON: I would like to get an answer, though, if you can give it to us: How long would it take?

THE WITNESS: Starting—well, I know that the wishbone-shaped district in Northeast Florida that was proposed by the Senate and was ultimately adopted by this Court, it's a—or in the Florida plan, the district which

goes from Jacksonville down to Alachua County, in both those instances, literally scores of hours were spent crafting that single district in a way to try to create or maintain an African-American opportunity district.

The problem in Northeast Florida is that the urban—and also in Miami—is that the urban core has not kept pace with the rest of the state in terms of population growth. And so in those districts you could add population and adding populate oftentimes means going outside the urban core. The [214] closer the margins are that you're starting with, the more difficult it is to cross the threshold of a 50.1 or a 65 percent or whatever.

JUDGE VINSON: Answer the question. How long would it take?

THE WITNESS: Starting from scratch, it would be—it would take a very, very long time.

JUDGE VINSON: Eight hours? Sixteen hours? Two hours? One hundred hours? What are we talking about? You're not starting from scratch now. You have got a lot you have already got worked out.

THE WITNESS: The—I would guess that it would take ten to fifteen hours to ascertain within a geographic confine whether it was going to be possible. We do not have a good target here yet. If we're talking majority Hispanic VAP, 50.1 percent Hispanic VAP and 50.1 percent African-American VAP and we want four Hispanic and three African-American district, then the other thing that I would have to have as a starting point is how large an area are we willing to look at. Do we want to limit our focus to only Dade and south Broward County? Do we want to go to Fort Lauderdale? Do we want to go to Brevard County?

JUDGE VINSON: Well, he's already said including Fort Lauderdale, Fort Lauderdale south.

THE WITNESS: Fort Lauderdale south, I do not believe [215] it is impossible, given the rest of time, based on the 1990 Census figures to create two—weli—three African-American and four Hispanic VAP's—

JUDGE VINSON: No, he asked you two black districts, one access district, plus four Hispanic districts, all with a VAP majority.

THE WITNESS: Assuming that access is greater than 25 or 30 percent, I don't believe that you can have two black African-American majority, one African-American access and four Hispanic VAP majority districts in that area. I don't believe that it's possible.

MR. BURR: Your Honor, if I could just make a brief statement. I know this is little irregular. And this is information that is not in the witness' knowledge, but I believe the Court obviously is struggling with trying to get to a solution.

JUDGE HATCHETT: Well, we don't ordinarily have people just stand and give speeches. Could you communicate with your co-counsel there and have him put it in some type of a question?

MR. BURR: Yes. I'm trying to assist the Court. I will be happy to be quiet.

JUDGE HACHETT: Find some other way of doing that rather than simply standing up and testifying.

MR. ZACK: Your Honor, may I make a suggestion? [216] JUDGE HATCHETT: Yes, Mr. Zack.

MR. ZACK: I don't believe this Court should have a plan that wouldn't have been precleared. In preclearance we were told that 65 percent, 64.3 was the minimum that would be precleared upon a Hispanic seat. For this Court to ask questions of a 51 percent VAP Hispanic seat wasn't even passed preclearance by the Justice Department. I would ask the Court to—in order to help the Court understand what is possible here—to pose the question in terms of electable seats as Gingles requires. I would ask the Court to do that.

JUDGE HATCHETT: We have heard you, Mr. Zack.

MR. ZACK: Thank you, Your Honor.

MR. HEBERT: May I proceed?

JUDGE HATCHETT: Yes, you may.

MR. HEBERT: For the record, Mr. Burr simply wanted to bring to the Court's attention the fact that last night he and his parties drew a plan for the South Florida area that did exactly what I think my question proposed and did it last night.

MR. BURR: Not quite, almost but not quite. We limited it not to Fort Lauderdale south but to the three-county area.

MR. HEBERT: Which is—

JUDGE HATCHETT: Palm Beach, Broward and Dade?

MR. BURR: That is correct, Your Honor. And I have [217] given the results of that effort to Mr. Hebert. And all I can say is that based on our experience it is technically feasible to draw a four and three, but we were completely unable to get the percentages of the districts up to a level that I believe the parties will find acceptable. And that effort took approximately ten hours.

JUDGE HATCHETT: Thank you.

He agrees with you, Mr. Zack.

MR. ZACK: I better sit down.

By MR. HEBERT:

Q You indicated a few moments ago that—when you were describing the third access seat for African-Americans, you said that assuming that third access seat would be 25 to 30 percent black, I think you said?

A Right.

Q So, you defined a black access seat as being one that's 25 or 30 percent?

A I tried to limit my—my role is or has been more providing technical decision support to members rather than legal opinions. So, I don't—I was using that really to frame the question rather than to indicate what my belief is as to what makes an access seat.

Q So, for purposes—

A I would rather—

MR. ZACK: Let me object to the issue of what [218] constitutes an access seat because you would not let him testify as to any legal opinion on direct. We would love to get into a lot of legal opinion, but I object to any legal opinion being asked.

JUDGE HATCHETT: Rephrase your question.

MR. HEBERT: Sure, and I don't want a legal opinion. The reason I brought up the word "access" is that was the witness' answer in response. And I simply wanted to pursue what he meant by that. I agree. He is not an expert.

BY MR. HEBERT:

Q In your answer then, you were using "access" purely as a statistical reference in the sense of saying that any district 25 to 30 percent black or greater, you were just determining that an access seat without regard to the political effectiveness of that seat; is that what you answered?

A It really had more to do with numerosity. And just running the numbers through in my head as you pose the question, I took Fort Lauderdale south, knowing what I know about the distribution of the population. And the answer was that I don't believe there would be two majority seats and an access seat.

Q The De Grandy proposed Senate plan that you gave us some testimony about, isn't it a fact that it creates two black majority VAP districts over 60 percent and a third district that is over 40 percent black in VAP?

A The De Grandy plan has two districts that are right in the [219] vicinity of 57 percent VAP. One is 57.1 percent in Broward and Dade Counties. The other is 57.3 percent in Dade County.

Q You are correct. I gave you population statistics and I apologize.

A And then the access seat or the so-called access seat in the De Grandy plan is district 24, which has an African-American VAP of 35.2 percent; that district goes

through Palm Beach, Okeechobee, Henry, Martin, St. Lucie, Indian River and Brevard County.

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TESTIMONY OF LISA HANDLEY

TR VOL. VI

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[185] At the commencement of the portion of the trial having to do with the Senate case we moved into evidence, proffered NAACP Exhibit 1, and at that point it was not made, it was made a part of the record but not received in evidence.

At this point Mr. Guthrie has testified about it. NAACP Exhibit 1 has referenced it. I believe Representative Logan has testified about it, certainly the last witness has now testified about it and explained it, and it is an essential component of the NAACP's case.

Iwould not, if this case goes up on appeal, I [186] want it to be clear what the NAACP's case consisted of, and we are left with a lot of testimony about a document that is the heart, as a matter of fact it is the only part of our case that is not formally received in evidence, and I would proffer it at this point and ask that it be received.

JUDGE HATCHETT: One minute.

MR. BURR: It is the NAACP's Section 2 case.

JUDGE STAFFORD: What is that exhibit?

MR. BURR: That is the, it is the Burke-Wallace plan for the Senate.

JUDGE HATCHETT: You may have very short argument on this matter. We are—

MR. BURR: Well,—

JUDGE HATCHETT: Not you, Mr. Burr, the people I assume who are going to—(laughter)—people I assume who are going to object to it. I assume you are going to object?

MR. GREGORY: Mine is very brief, Your Honor. My recollection was this Court ruled that should we get to remedial stage that you would then consider the plan if necessary, but other than that the Court was going to deny it being introduced into evidence.

I don't see that there is any prejudice because if we don't get to remedial stage, it's academic if we [187] do, it might be considered at that point, so I would ask the Court merely to reaffirm its earlier ruling.

JUDGE HATCHETT: Mr. Cardenas?

MR. CARDENAS: Yes, Your Honor, I would certainly agree with counsel. Our spirit is that all doors are open at the remedial stage, but bear in mind our objection for it to be submitted into evidence at this point stems from two reasons.

One, the issue that was covered at the very outset by Your Honors in terms of the fairness or the timeliness of the document. The other and most prevailing argument was while counsel decided on his, to propose his or agree with the motion for a directed verdict against the plaintiffs in the case, at that point in time something happened in my opinion which in essence makes this document not introducible by plaintiffs in this case since we are dealing with the State Senate, and there has been a motion for a directed verdict made by the NAACP in the matter, and from those, from those grounds primarily we would object to its submittal now.

As we said, we certainly agree that if we get to a remedial stage there, their input is very valuable, and we would agree with that, but certainly at this stage it doesn't make any sense.

[188] MR. BURR: May I respond briefly?

JUDGE HATCHETT: We don't need any response.

MR. BURR: Okay.

JUDGE HATCHETT: Government—NAACP Exhibit 1 will be admitted into evidence.

(Whereupon, the aforementioned document was received in evidence as NAACP Exhibit Number 1.)

JUDGE HATCHETT: As far as we know now that completes the Senate evidence except for the matter that Mr. Zack discussed earlier a few minutes ago.

MR. ZACK: And reserving anything that the Senate, the House doesn't cover by other witnesses.

JUDGE HATCHETT: Right.

MR. ZACK: I want to be clear for the record, the NAACP submission is their submission, and I have taken it in effect out of order in the Senate's case.

JUDGE HATCHETT: Yes.

MR. ZACK: All right, sir.

JUDGE HATCHETT: Yes. The Court at this point would like to entertain and hear argument regarding the proof in this case as to the Senate side of the case,

* * * *

[244] Q All right. Dr. Handley, I show you what has been marked for identification as House Defendant's Exhibit 19.

Would you identify the document?

A That's the affidavit we prepared for this case.

Q Okay. How are you employed, Dr. Handley?

A I'm sorry?

Q How are you employed?

A I am Senior Research Analyst, Election Data Services, a political consulting firm in Washington, D.C.

Q And your educational background?

A I have a Ph.D. in Political Science from George [245] Washington University.

Q You have previously qualified and testified as an expert in this matter?

A Yes, I have.

Q On the subject of?

A Voting rights, I guess, generally speaking, redistricting.

Q Congressional case subject—

A Yes.

Q What tasks were you requested to do by the House in this part of this litigation?

A I had two major tasks. The first one was to do a racial black voting analysis and to prepare a draft report for the House of Representatives; and the second was to look at the viability of minority, proposed minority districts and the alternative plans put forward.

Q Briefly, briefly describe the racial bloc voting analysis which you conducted.

A I looked at all statewide congressional and state legislative races in the State of Florida from 1986 on that included a minority candidate, looked at six major urban areas in local elections and what we have identified as six major urban area counties some local election returns in those areas.

I used the two standard techniques that have [246] already been described to the Court, bivariate ecological regression analysis and homogenous precincts analysis to do that.

Q What, why two standards? Why two methods?

A The two are complementary of each other. For example, homogenous precinct analysis you wouldn't want to use alone because it only looks at homogenous precincts, and in case voting behavior is slightly different in precincts that are heavily segregated versus precincts that are integrated, you would also want to look at ecological regression analysis which considers all precincts.

Q Then the type of population of a district would determine to some extent the type of analysis you do?

A Well, it's true that sometimes you can't do a homogenous precinct analysis because you don't have homogenous precincts that are precincts that are 90 percent black, white or Hispanic.

Q Were you able to reach any conclusions based upon this analysis, and if so what?

A I found that generally speaking voting did tend to be polarized in Florida, that participation rates were low for minority groups, especially were lower for minority groups than for whites, especially Hispanic turnout rates. That both of those things varied by areas of the state and by district.

[247] Q For example, very, what area of the state, where was it particularly low or particularly high?

A For example, in, well, the only place I could get good Hispanic estimates were in Dade County, but I found that some districts, in some districts Hispanic turnout tended to be even lower than the statewide average for Hispanic turnout.

Q In fact, the area that we asked you to take a look at was Dade County.

A One of the areas that I was asked to look at was Dade County, that's correct.

Q All right. With reference to that area, Dade County, did your analysis reach any particular conclusions as to that area of the state?

A Yes, generally speaking voting was polarized in Dade County. Whites tended to vote for white candidates. Hispanics tended to vote for Hispanic candidates, and blacks tended to vote for black candidates.

They also found that whites turned out at the highest rates, blacks at the next highest rates and Hispanic turnout was considerably lower than both of those groups.

Q Do your findings have any implications to the drawing of minority districts in Dade County?

A The fact that minorities turn out at a lower rate means that you need to draw districts that are greater than [248] 50 percent black or Hispanic VAP, particularly in terms of Hispanic population. Because turnout was so low, in order to draw effective minority districts you had to put them at considerably above 50 percent Hispanic VAP.

Q For Dade County how much greater is required for—

A That varied considerably by district. That's exactly the reason that you needed jurisdiction specific analysis. I looked at each district separately.

Q Why would it vary by district?

A Hispanic turnout rates were not consistent across all of Dade County. There are some districts in which

you may find low Hispanic turnout because you included, for example, oops, it's that "N" word, more non-citizens than other groups, but that's why—

Q Did this kind of analysis for any proposed minority districts—

A I'm sorry?

Q Did you do that type of analysis for any proposed minority districts?

A I did this analysis for all proposed minority districts. That is all districts actually 30 percent or greater black or Hispanic.

Q In Dade County?

A In Dade County.

[249] Q What did this entail, the analysis? What did you do?

A To determine the effectiveness of the district?

Q (Nods affirmatively).

A The analysis was actually two-fold. What I did was I looked at all districts with 30 percent or more minority population, and if the district was, for example, 65, 67 percent Hispanic or greater, and recompiled election returns that I looked at determined that the minority preferred candidate would have won in both of the races for which I had recompiled election return with minority preferred candidates, I determined automatically that that district was safe.

Q Say that again. I'm sorry.

A Okay. I did a two-fold analysis.

Q I heard that part.

A Okay. The first run through I identify, I should say that I did this a lot, I looked at literally hundreds of minority districts, and in determining whether a district was safe or effective or not, it quickly became apparent that every district over 67 percent Hispanic which recompiled election returns indicated that the Hispanic preferred candidate would have won in both of the contests that I had to look at. Then I classified that district as safe.

[250] In terms of black districts, if the black VAP was 57 percent or greater, and the black candidate won all

of the elections, statewide elections that I had to examine, then I classified that district as safe.

At that stage then I went to all of the other districts, and did a more indepth analysis of all of the remaining districts. I looked at things like the minority voting age population of districts. I looked at the partisan makeup of the District. I looked at, again, recompiled election returns for that district.

Q What is recompiled election returns?

A I took some statewide contests in which I knew that black preferred candidates and Hispanic preferred candidates had run, and what we do is we recompile the precinct returns up to the new district level to determine if that candidate would have won in the newly configured district.

Q Why do you recompile it? Why is that?

A Why do we recompile?

Q Yes.

A To determine if the minority preferred candidate could win in the new district.

Q Okay. What conclusions were you able to reach based upon this analysis?

A Well, actually let me finish the rest of my [251] analysis.

Q All right.

A I mean, I looked at, like I said, the partisan makeup. I looked at recompiled election returns. I also looked at turnout rates. I also looked at the degree of minority cohesiveness in the district. I looked at the degree of white crossover vote I might expect in the districts. I looked to see if there was a minority incumbent sitting in the district, all of those things went into my analysis.

Q Did you find that Hispanic voters are as cohesive as black voters in Dade County?

A No, black voters were more cohesive than Hispanic voters.

Q In fact the contrary is true?

A I'm sorry?

Q The contrary is true in Dade County? Hispanics are more cohesive than black voters?

A No, black voters are more cohesive than Hispanic voters.

Q Thank you. Okay. What is your definition of an effective, effective minority district?

A An effective minority district is a district in which it's likely that a minority preferred candidate could win. [252] But let me further say that there are degrees of effectiveness. As Dr. Lichtman pointed out in his testimony on Saturday, in fact, he said that, well, he called them safe and later on he called them rock solid districts, that is districts in which you are almost certain a minority candidate would win versus competitive districts, that is districts in which minorities are provided an equal opportunity or possibly a realistic opportunity to elect a minority preferred candidate.

Q So that the types of the effective districts are what and what?

A Safe and competitive.

Q And safe is rock solid and competitive is—

A Equal opportunity, that's correct.

Q Under your standards, your analysis, is it possible in this criteria to have a district with less than 57 percent black VAP or less than 67 percent Hispanic VAP would that district be classified as safe?

A Yes, certainly. The districts that were over 67 percent black VAP that had recompiled election returns that indicated the minority preferred candidate would have won were automatically classified as safe, but certain districts had fell below that level could be classified as safe.

In order to be classified as safe a district had to, had to be able to tell, first of all, that recompiled [253] election return had to indicate that the minority preferred candidate would have won all of the elections I examined.

Second of all, turnout rates had to indicate that the minority would be at least 50 percent of the voters on

election day; and third of all, I had to know that the minorities were, in fact, cohesive in that district in order for the district to be classified as safe.

* * * *

[257] Q Sure. Under your analysis where you have calculated out the number of effective minority districts, you actually find more effective minority districts under Reaves, Brown, Hargrett in the De Grandy plan than there are total number of districts under the State's plan?

A If you combine safe and competitive that's correct.

* * * *

[258] Q Let me move on.

The language that you employed to describe a competitive district, and I believe in the report that I showed you a copy of a moment ago you have a definition which I would like you to read out loud for me, one sentence, into the record which actually includes a definition of safe and competitive, and it's listed right, right here on this Exhibit 13.

If you could read that for me, "Districts" that is where it begins.

A "Districts that are almost certain to elect [259] minority preferred candidates are referred to as safe districts, while districts that provide minorities with an equal opportunity to elect candidates of their choice have been referred to as competitive districts."

Q The last segment of the definition on competitive to an equal to elect candidates of their choice?

A That's correct.

Q Isn't that almost verbatim the language out of the Section 2 of the Voting Rights Act?

A That is where I got it.

Q Thank you.

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TESTIMONY OF THOMAS HOFELLER

TR VOL. IV

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[67] me as sufficiently large and compact, I think about it in the geographical context which means to me that we are really talking about whether or not the northern community itself is sufficiently large and compact in order that districts can be drawn which will allow them to elect candidates of their choice.

Once you determine that, then you may draw districts that will allow that to happen, given the distribution of population within the districts. But particularly within the Florida context, I think that again you want to have a district which is manageable politically.

* * * *

[69] A I think that when you are talking about size, you are talking about geographic size rather than population. Obviously, all the districts would be the same size with regard to population. One sees in all plans districts which range over large geographic areas. Some of them are regularly shaped, some of them are irregularly shaped.

So if you are talking about largeness in terms of geographic area, one would be talking about the length of the district, the width of the district, or one would be talking in some sense about again the manageability of the district with its size. For instance, does it go into a large number of media markets, does it range out over a large number of different types of communities? Would it be very difficult to campaign? So if—if those objections are not really there, then it would be sufficiently compact and would not be too large.

* * * *

[85] Q And my point is that once proportional representation has been made, do you then have that element of the compactness consideration removed from the consideration?

MR. RUMBERGER: Judge, I would object. We are not into that aspect of this at all. It surely exceeds cross-examination—or direct examination.

JUDGE HATCHETT: Overruled. Doctor, you may answer the question.

A I—I personally don't believe that proportionality is a limit either way. It isn't a limit on the upper limit or isn't a limit on the lower limit of the number of minority seats you would build. If that were the case, for instance, if you were to follow what I believe is your line here, we wouldn't have three black congressional districts in Los Angeles, we wouldn't have three black congressional districts in Chicago.

Q My question, though, was it a consideration. I didn't ask was it a bright line.

A I think it's a passing interest, but I don't think it should be used at all as a criteria for determining the number of seats. If you're going to determine the number of seats, you should determine it for the plan as a whole. Where you draw them has to do with where it's possible to draw them.

Q So you assign relatively little values to the fact a [86] particular minority has achieved proportional representation?

A If you were talking about the—

Q Please answer yes or no.

A I—

MR RUMBERGER: Do you need some elaboration?

A I can't answer that question yes or no, because—

Q Isn't it true by your last statement that you place little value on the fact that a minority group has achieved proportional representation in the context of your definition of compactness?

A If you're talking about the plan as a whole—

Q Please, yes or no.

A I—I can't answer that question yes or no.

JUDGE HATCHETT: Answer the question the way you can answer it.

BY MR. CROWLEY:

Q Yes or no and then you can explain.

A Yes.

JUDGE HATCHETT: He has a right to answer the question. I think he's done it about three times.

Answer the question.

A If you're talking about using proportional representation as a standard for determining how many seats the Hispanics should get in Dade County, then I would say the answer is no.

If you're asking is proportionality important as to [87] how many seats the Hispanics are getting in the Florida plan as a whole, I would say, yes, it would certainly be a consideration.

BY MR. CROWLEY:

Q That's certainly an answer, though, that doesn't address compactness, does it?

A We aren't talking about compactness, we are talking about proportionality. I think they are two different topics.

Q I want to know how proportionality relates in your mind to Dade County, since you have done an eyeball study. Please limit your answer to Dade County.

A How it relates in what way?

Q In the relationship of drawing the appropriate number of districts in Dade County, given that they have proportional representation under the Florida plan.

A I think in regard to drawing the appropriate number of seats in Dade County for a statewide legislative plan, it has no bearing.

* * * *

[105] If you would, please compare and contrast the plans and their impact in African-American electorates in Dade County.

A Okay. Thank you.

Q Based on your personal knowledge and experience?

A Yes. What we were simply trying to do is make certain that every possible district that could be created that would elect an African-American was created. At the same time we knew we had—there is a —see, once you go down to the south area, which runs from South Miami to Richmond Heights, [106] Perrine, Florida City, Homestead and some other areas where there are solid black comunities—for instance, Richmond Heights is a community where blacks have created this community, and so it's been a very strong, very solid black community, middle class. And we want to make sure that those persons as well had an opportunity of continuing in having a black representative, regardless of the person. And so we worked diligently to get that district up by combining those communities. And we got it up to a safe 38.8 percent district.

Q Now, does the Reaves, Brown plan or the De Grandy plan have an adverse impact on the African-American population in Dade County?

A Without a doubt. In fact, it has a progressive impact on those communities.

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TESTIMONY OF ALLAN LICHTMAN

TR. VOL. III

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[5] MR. MEROS: If I may just address one procedural matter? Just this morning the De Grandy plaintiffs have filed with the court and served copies on the other parties of a motion for leave to file voluntary dismissal under 41(a)(2) with respect to House districts outside of Dade and Escambia County.

* * * *

[12] Q Now, we are going to actually get into the declaration sworn statement affidavit that you have executed. What I want to ask you, doctor, is what were you asked to do in this case?

A I was asked to examine the materials in the record in this case, particularly materials prepared by defendants, their experts, and their consultants, with a mind to examining how [13] those materials affected a number of issues, in particular, racial bloc voting, with a focus on minority cohesion, and white bloc voting in the Dade County area, and particularly involving Hispanics.

I was asked moreover to make an assessment of the extent to which such racially polarized voting, if any, affects the opportunities of minorities, specifically for Hispanics to elect candidates of their choice in various districts, both with respect to the state's plan and any possible alternative plan designed to provide Hispanics greater opportunity.

I was also asked to assess whether potential alternative plans to provide greater opportunities for Hispanics had an impact upon black opportunities within Dade County to elect candidates of their choice.

Q Now, you have used a couple of terms and I should have asked you to do these before I asked you your charge here in this case, but you used the term "cohesion and racially polarized voting." Would you briefly define those terms as you used them?

A Yes. Racially polarized voting simply refers to the extent to which minorities and whites or the Hispanics and nonHispanics, as it is in this instance, tend to support different candidates of choice. Such racially polarized voting can become politically significant if it has an impact [14] upon the ability of minorities in a given context, like in this particular plan here to elect candidates of their choice and to participate fully in the political process.

JUDGE VINSON: Are you including racially polarized voting with Hispanics.

THE WITNESS: It could be Hispanics. It could be blacks. I'm equating it with any minority group, that's correct. We call it ethnically polarized or racially or ethnically polarized—

MR. WAAS: Your Honor, if I may? For the record, let me pose an objection to this testimony. Since he declared what his testimony is going to be, we believe that that testimony is improper expert testimony. He's done no analysis on his own. He's prepared no reports. As I understand his testimony. He's going to take the report submitted by others, the expert analyses done by others, run them through him, and he's going to say what's wrong with them.

JUDGE VINSON: He's in the nature of what you call a summary witness.

MR. WAAS: Exactly.

JUDGE VINSON: That's allowed under the circumstances of this case, particularly. That's overruled.

THE WITNESS: Shall I continue?

BY MR. HEBERT:

Q Would you please finish up for us?

[15] A And really racially polarized voting or ethnically polarized voting breaks down into two parts. The first part we generally call political cohesion. And that refers to the minority side of the coin, the extent to which minorities unite behind candidates of their choice; and then the opposite side of the coin is generally referred to as bloc voting, the extent to which another group units behind different candidates of choice. And one is trying to make an assessment here of the extent to which minorities are cohesive and in turn to which other groups bloc vote for different candidates.

Q And your definitions are set forth in Paragraph 4 of Government Exhibit 46, are they not?

A They are.

Q Now, what information—you said that you had studied reports prepared by experts for the State of Florida.

MR. HEBERT: If I might, for the court, for the benefit of the record, let me state that the documents that Dr. Lichtman relied on were in evidence in the con-

gressional case. So these are documents already in evidence before the court.

BY MR. HEBERT:

Q Dr. Lichtman, what information or data in those expert reports did you study?

A There is considerable information in those expert reports bearing upon the issues that I mentioned. First of all, there [16] are considerable bodies of analyses of voting by the various demographic groups within Dade County, specifically Hispanics, blacks and whites. Those studies utilize the two standard techniques in the field for assessing voting behavior, namely ecological regression analysis, an extreme case, or homogeneous precinct analysis.

In addition, there is, of course, the straight demographic information on the composition of the district in the state's plan and various alternatives, and there is also what we call recompiled election results. That is to take the results of elections involving minority candidates and compile those elections to the particular precincts within particular districts and thus come up with an assessment of if an election had been held only within a certain district, what would have been the results of that election.

Q Now, how many elections are there that you had an opportunity to study that was set forth in the reports or—by the consultants in—for the State of Florida?

A Well, in particular, for the racial or ethnically polarized voting studies, there are ecological regressional analyses and extreme case analyses of some 13 state legislative contests, or state House or state Senate in Dade County that involved Hispanic candidates from 1986 to 1990 in either general elections or Republican primary contests. This is quite a considerable data base actually, 13 recent [17] elections in the state legislative area. It is, for example, a much more extensive data base for the particular elections being considered than we had as experts in the Los Angeles County redistricting case, *Garza*

versus Los Angeles County. It's certainly enough to draw conclusions about political cohesion and bloc voting.

In addition, there were ecological regression analyses and extreme case analyses of local elections held within Dade County, elections for positions such as the county commission. And for completeness sake, I also compiled the ecological regression results of those elections.

Q The term "ecological regression and extreme case analyses," those are statistical techniques used generally experts in the field to exam voting patterns?

A Yes. Those are the two techniques used by Dr. Bernard Grofman, expert for plaintiffs in what became the Supreme Court case, *Thornburg versus Gingles*. And those are the techniques that both Dr. Grofman and I used. We were co-experts in *Garza versus Los Angeles County* case. And they are used on a standard basis by experts in this field and were used by experts and consultants for the various bodies of the State of Florida.

Q And—and for the record, doctor, you testified on behalf of the United States Department of Justice in the *Garza* case and in other cases as well, have you not?

[18] A I testified on behalf of Justce in other cases, in *Garza*, as well as other plaintiffs and defendants.

Q Now, these 13 elections that you analyzed, would you give us some of your conclusions about what—what the study of that information shows, not in terms of your ultimate conclusion about cohesion or bloc voting, but what do these 13 elections tell you and where are they set forth in your affidavit?

A These elections are simply compiled in Table 1 in my affidavit. I did not, as has already been indicated, do any independent ecological regression or homogeneous precinct analyses. I simply took the results compared by experts and consultants for the state and reported them in Table 1. And my conclusions and particular findings are summarized in the affidavit.

Simply put, what I found was that for the 13 state legislative elections examined by experts for the state, they show a clear pattern of racially polarized voting,

marked by Hispanic cohesion, white bloc voting, and black voters that, to the exient they were able to isolate information on black voters, showed that they united with white voters in opposition to Hispanic candidates.

In particular, with respect to the political cohesion of Hispanic voters, I found that in 11 of 13 elections, 11 of the 13, the ecological regression results reported show that [19] by a majority of 75 percent or more, Hispanic voters united behind Hispanic candidates in elections for state Senate and state House in Dade County. The only exceptions were to primary elections; one, a three-way primary, and the other in the uncontested primary.

On average, for all 13 elections, the mean vote by Hispanic voters for the Hispanic candidates was 79 percent compared to a mean Hispanic vote for nonHispanic candidates of 21 percent.

So empirically the data shows a cohesive Hispanic electorate that an overwhelming majority prefers to vote for Hispanic candidates in state legislative contests.

In addition, these same results show a pattern of strong bloc voting by whites. That is, whites consistently preferred different candidates than the Hispanics, in particular the non-Hispanic candidates, likewise, by very large majorities.

The experts for the state were able to isolate white bloc voting in 12 of the 13 elections. In 11 of those 12 elections a majority of the white electorate voted for non-Hispanic candidates. In ten of the 12 elections the white majority vote for nonHispanic candidates was two thirds or greater.

So in ten of the 12 elections which we have data on whites, they voted by two thirds or more on the non-Hispanic [20] candidates.

Overall, the mean white vote for nonHispanic candidates was 76 compared to a mean white crossover vote for Hispanic candidates of 24 percent.

Finally, with respect to these polarized voting findings. In most cases the experts were not able to isolate the

black vote and separate it out from white and Hispanic votes, but in five instances, either through ecological regression or extreme case analysis, results for black voters were reported in all of those five elections, in everyone of them, blacks voted for non-Hispanic candidates by majority of 80 percent or more. That means that the maximum black vote in any of the five elections to which estimates were obtained for the Hispanic candidates was under 20 percent. Never even reached a 20 percent black vote for the Hispanic candidates.

So to sum up, the state legislative data shows a pattern of Hispanic cohesion, strong bloc voting by whites, and to the extent the voting of blacks could be isolated, the black vote likewise was cast in opposition to the candidates of choice of the Hispanic electorate.

Q And the legislative results that you just set forth, those are set out in your affidavit in Paragraphs 5 through 8, is that correct?

A Yes. And in Table 1.

Q And in Table 1?

[21] A Which simply reports the ecological regression results, organized by whites, blacks and Hispanics, and in parentheses where they reported homogeneous precinct results I put them in as well.

Q Now, where there were additional—you described state legislative results. Have you also examined the results of the elections that were analyzed regarding local office in Dade County?

A Yes. For completeness, since there were local elections involving Hispanic candidates that were reported by experts for the state, I did summarize the results of those elections as well. And they show—

Q What do she show?

A —similarly a pattern of Hispanic cohesion and white bloc voting, and likewise blacks uniting with whites in opposition to the Hispanic candidates of choice.

I won't belabor these, but in seven of ten elections for these local offices in Dade County, a majority of the Hispanics voted for the Hispanic candidate. In eight of

ten a majority of whites voted for the non-Hispanic candidates. And in seven of the nine elections which results for blacks are reported, a majority of blacks supported non-Hispanic candidates.

So again, usually Hispanic voters show that they prefer to elect Hispanic candidates in these local elections, [22] and usually white and black voters showed that they didn't.

Q Your affidavit in Paragraph 10 says that there is a high degree of racially polarized voting and it's been documented for the elections. What does that indicate with regard to the ability of Hispanic voters to elect candidate of their choice to office for legislative races?

A Of course, polarization among racial and ethnic groups has a direct bearing upon election outcomes since it influences the extent to which various voters can muster support for candidates of their choice.

What these patterns of polarized voting show is that Hispanic voters would have opportunities to elect candidates of their choice only in districts with substantial Hispanic majorities.

In other districts, the candidate of choice of Hispanic voters would usually be defeated by the bloc voting of whites joined in by blacks. So these polarized voting plans indicate that the racial composition and ethnic composition of districts has a significant and direct impact upon the ability of the Hispanic minority in Dade County to elect candidates of their choice.

* * * *

[24] Q How do the results that you have reported, how does that compare to results of past elections in Dade County for Hispanic voters?

A Well, these findings of racial and ethnic polarization are consistent with the actual results of elections. We kind of find here what we also found in Los Angeles, kind of a threshold effect with respect to Hispanics. Once the Hispanic concentration reaches a certain point, then all those districts seem to elect Hispanics, but below that

given point, none of the districts seem to elect Hispanics. And the ethnic and racially polarized voting is reflected in the actual results of Dade County elections in which no Hispanic candidate—excuse me, no candidate of choice of the Hispanics, no Hispanic candidates has been elected in districts below a 59 percent Hispanic level, and in districts at 59 percent and above, those districts have in every instance elected Hispanic candidates. You kind of have very uniform patterns which are extremely consistent with the [25] statistical results.

This is a case where we have a method of what's actually happening on the ground in elections and what the statistics seem to be telling you.

Q Are these results that you have reported today and set forth in your tables, are they consistent with the reports done by experts and consultants for the State of Florida?

A Yes. In reviewing those reports, it seems to me, sometimes quite explicitly, and certainly of quite tacitly, the experts and consultants for the state recognize that there is strongly polarized voting in Dade County and that such polarization has a significant impact upon the ability of Hispanics to elect candidates of their choice. In particular, consultants did not find any of the plans that they analyzed, they analyzed a lot of them, that any district in Dade County was, in their terms, an effective Hispanic district in less and included and Hispanic voting age majority and indeed a substantial Hispanic voting age majority. Voting wasn't polarized along racial lines and ethnic lines. Voting was random with respect to the racial and ethnic composition of districts. You would not find such a clear cut pattern that the consultants found. No districts were affected for candidates of choice for Hispanics unless they had a substantial Hispanic majority.

So their findings about polarized voting and it's [26] political impact mesh with the findings I have been reporting to this court this morning.

And indeed in the—one of the submission letters by—I believe it was the state Senate. If I can find the reference here. They explicitly talk about a cohesive Hispanic electorate within Dade County and indicate that their Senate districts support that consistent Hispanic cohesive electorate. I'm sorry. Let me find the exact reference.

(Pause)

(Discussion off the record)

JUDGE STAFFORD: (Indicating)

BY MR. HEBERT:

Q Well, while you are looking for that—

MR. HEBERT: Judge Stafford?

A Here it is. These supermajority districts—

BY MR. HEBERT:

Q Where are we?

A I'm on the very end of Paragraph 13. This was a transmittal letter from the Florida Senate. And these conclusions are consistent with mine where I am just reading from the end of their short quote, the very top of the page. The supermajority districts respect the cohesive Hispanic communities within Dade County. And likewise my analyses of Hispanic voting shows with respect to voting, you do indeed have cohesive Hispanic entities in Dade County. So I don't [27] see a dissidence here between my findings and theirs.

MR. HEBERT: Judge Stafford?

JUDGE STAFFORD: Dr. Lichtman, I don't want to interrupt your presentation, but I want to satisfy myself that in—in all of this, whether it's your work or your extrapolation from somebody else's, that purely local issues have been ferreted out of these—of these figures. In other words, some of the volatile local—I think it's Tip O'Neal that says all politics is essentially local. And—could it be that in some of these areas even in Dade County, within the county itself, that there are local

issues that just the people living in that particular geographic locale would have some interest in and would not necessarily reflect anything other than a—a focus for that finite period of time on a purely local issue, be it a bond issue or something else?

THE WITNESS: Certainly would not dare to disagree with Tip O'Neal.

(Laughter)

Indeed there are always local issues, of course, that affect elections typically, locally based elections like state legislative ones. What I think is particularly revealing in this data was regardless of what the particular local issue is, might have been in a given election, regardless who the candidates might have been, regardless of what they spent or how they campaigned or how they presented themselves, nearly [28] uniformly, not quite, but nearly uniformly you find Hispanic voters uniting behind Hispanic candidates in overwhelming numbers, and you find white voters and black voters likewise in overwhelming numbers in almost every instance uniting for nonHispanic candidates.

So how those local issues might filter through, you still find this very strong pattern of racially polarized voting which is why we try to look at a pattern. You don't just look at a single election which could be influenced by local factors or having an unusual situation like a black Republican running in a general election. And we certainly have a sufficient number of state legislative elections here and a clear enough pattern to see the racial and ethnic polarization even coming through all the various local factors that might have impinged on every one of those elections.

JUDGE STAFFORD: (Nodded affirmatively)

BY MR. HEBERT:

Q You mentioned before that there was a reference to Florida Senate's submission in terms of districts, supermajority districts. And they indicated and you quoted

that they respect the cohesive Hispanic communities in Dade County. What I want to ask you is not so much to focus on the state's plan, now, with regard to the Senate, and we will talk about the Senate here, can you tell me whether there are any additional plans, alternative plans that provide additional [29] opportunities for Hispanic voters in the state Senate in Dade County than the state's plan?

A Yes, there are. And in light of the polarized voting findings, in particular, I examined a plan which I believe it's called Reaves, Brown, Hargrett for the Senate which creates within Dade County an additional, quote unquote, supermajority district, District No. 40, with a substantial Hispanic voting age minority of 62.1.

MR. WAAS: Your Honor, I would object. We are getting into information now that is appropriate for any remedy stage of the proceedings, as opposed to liability.

JUDGE VINSON: Overruled. He doesn't have to repeat what we have already heard about the Reaves, Brown plan. Let's just go on.

MR. HEBERT: I think, Your Honor, my only point, we won't belabor this, is to show that if you actually take the results of the elections that the state has analyzed and look at those conclusions that are—everyone I think agrees to, and then look at the plans in light of those, he is simply characterizing what those plans provide. But I won't belabor it.

BY MR. HEBERT:

Q Did you finish up, doctor?

A Not quite. Just briefly summarized, I looked at these recompiled election returns, as we call them, the ones that [30] the state specifically chose as their so-called base line data base, that if you wanted to pick a representative election to see how a candidate of choice of Hispanics might fair, they chose the 1986 and 1990 Martinez gubernatorial elections. When I recompiled—I didn't recompile it, but when I looked at how the state had recompiled it for District 40 in the Brown, Reaves,

Hargrett plan, what I found was for the two elections, on average, the vote for Martinez was 55 percent. This result for the Reaves plan is not substantially different than the result for one of the three districts that the state has certified as providing Hispanic opportunities, that is District 37 in the state's plan, where the mean for Martinez was 56.3 percent, just a 1.3 percent difference between this district in the Reaves, Brown, Hargrett plan and one of the state certified districts in their own plan.

Q And—

A This data, as well as the racially polarized voting data, indicates that while one certainly would not say that district 40 provides a lock for the candidate of choice of Hispanic voters, it certainly does provide at 62.1 percent a realistic opportunity for Hispanic voters to elect candidates of choice in this district.

And I may add, by the way, in my view, the choice of Martinez elections for looking at opportunities for Hispanics is a very conservative one because in 1990, for example, [31] according the states data, the support by Hispanics for Martinez was only 59 pursuant, whereas as you remember in the state legislative elections the average support by Hispanics for Hispanic candidates was much, much higher, up in the range of about 79 percent. And although it's also true that white crossover voting is greater for Martinez than it typically is for these legislative candidates, that would not compensate for the much higher cohesion in the state legislative elections.

So I think even to the extent the Martinez elections show opportunity, if you had looked at state legislative elections, you would have found even greater Hispanic opportunity in District 40.

Q And to finish up with the Reaves, Brown plan, does the Reaves, Brown plan for the Senate in Dade County sacrifice any opportunities for black voters?

A No, it doesn't. And again, I looked at the two black districts in the Reaves, Brown, Hargrett plan and used the four base line elections also chosen by consul-

tants of the state. They were the Jackson primary, two Alcee Hastings primaries, and a yes vote for Mr. Shaw.

For both of those districts and for all of the elections, when you recompile the results in the two black districts in Brown, Reaves, Hargrett, the black candidate received in those districts at least 70 percent of the vote. [32] So in those districts, the black candidate was overwhelmingly winning.

* * * *

[35] A My opinion with that caveat, is that blacks are politically cohesive, that they do unite in large numbers behind candidates of their choice and do prefer to elect black candidates when there are elections with black candidates competing against candidates of other races.

Q Do you have an opinion about the extent of the political cohesiveness, if there is any, between blacks and Hispanics in Dade County?

A In my experience, blacks and Hispanics in Dade County are [36] not jointly cohesive.

* * * *

[49] Q. In the work that you did, in your, I guess, analysis of the other experts' analyses, did you make any attempt to determine how the various campaigns were put on, what kind of strategies the candidates used, how much money the candidates spends, what kind of targeting the candidates used? Did you do any of that?

A. No.

Q. And, of course, as an expert in this area, you are well aware that these types of aspects of political campaigns are important, wouldn't you agree? It's important to know how candidates campaign, how they spend money, how they do all these things—target media, direct their campaigns, channel their energies?

A. It is important for some purposes. As I've explained to the Court, though, for this analysis what we find is irrespective of all of those factors. Whatever the campaign level of funding may have been, whatever the

personalities, whatever the issues, overwhelming majorities in a vast majority of the elections, Hispanic voters united behind Hispanic candidates, and white and black voters united behind non-Hispanic candidates.

* * * *

[50] Q. What studies have you done, what analyses have you performed with respect ot the dynamics of Dade County voting that would support the answer to the question I just asked you?

A. Precisely the study I reported here, showing that on average fo rall the state legislative elections, you had nearly an 80 percent Hispanic vote for an Hispanic candidate. To put that in some perspective, in America political history, a land slide election is regarded at the 60 percent level. So we are substantially above land slide Hispanic support for a Hispanic candidate. That is just the empirical results.

Q. Let's put these into numbers. If you have a 55 percent district, and you get 75 or 80 percent of the Hispanic vote, of that 55 percent, you are going to have a problem, aren't [51] you, as far as being able to elect a candidate of choice? Isn't that true?

A. No, not necessarily.

Q. What analysis have you done that supports your answer that that's not true? What independent examination have you performed in Dade County?

A. Precisely the analysis presented here. You only gave me half of the equation—that is, the Hispanic vote for the Hispanic candidate. There is another half of the equation, and I talk about this in my articles that I referred to about how you assess realistic opportunities, and that is the crossover vote on the part of non-Hispanics. Your question presumed a zero crossover. That is very unusual. And, in fact, we find on average about a 25 percent crossover.

So, to take your hypothetical of a 55 percent district with 80 percent Hispanics, if you multiply 55 times .8, that comes out to about 44 percent of the Hispanic voters

alone. If you multiply the other 45 percent times 25 percent, you get 11 percent, and that comes out to a 55 percent vote.

Q. Are you talking about total number of citizens, or are you talking about voting age population?

A. I'm opearting solely within the context of your hypothetical, which had to mean voters.

* * * *

[68] Q. Now, Dr. Lichtman, I have had occasion to examine your work in lots of cases, and is it not your typical pattern to calculate the likely Hispanic or black candidate success by coming up with a combination of Hispanic cohesiveness plus [69] non-Hispanic crossovers to determine whether that figure indeed exceeds the votes for the opponent?

A. Run that by me again.

Q. All right. Has it not been your practice in many cases, in Lyco County, for example, comes to mind—in fact, I think you did this in Hardee County as well, and there are probably other examples—where you have taken the Hispanic support for the Hispanic candidate—

A. Yes.

Q. —added to that the white crossover anticipated—

A. Yes.

Q. —and in this case, the black crossover—

A. Yes.

Q. —and then compared that with the anticipated white vote for the white candidate, black vote for the opponents, and so forth. Is that not your standard practice?

A. I have done both recompiled election results and this technique that you've pointed out, yes.

Q. And did you use that technique in this case?

A. No.

Q. You did not?

A. No.

Q. So, you don't know—you have done no projections of how your typical procedure would result—would sug-

gest what the outcome would be in these particular districts?

[70] MR. HEBERT: Object to the form of the question, the word "typical." He has indicated that he's used both techniques, and he's used one here. He said he didn't do any independent analysis four times on cross-examination with the first counsel, and he's already said it again here, Your Honor.

JUDGE VINSON: Overruled. Dr. Lichtman can answer the question, and he can explain that. Go ahead.

BY MS. BUTLER:

Q. Dr. Lichtman, why did you not do that particular analysis in this case?

A. As I said, I did not do any independent analyses in this case. I simply relied upon the data that was in the record and available to me.

Q. Doctor, isn't that information in the record and indeed in your report? Could you not have done that analysis based on the information you've got? You've got Hispanic cohesiveness: you told us about that.

A. Pardon me?

Q. You've got Hispanic cohesiveness; you told us about that.

A. Yes.

Q. You've got white crossover; you told us about that.

A. Yes.

Q. Black crossover; you've told us about that.

[71] A. Yes.

* * * *

Q. So, basically, we are left with the only amount that you have for District 40 is based on the Governor's race?

A. And the comparison of the results of the Governor's race to the results in districts certified by the state as providing Hispanic opportunities, and the fact that this [72] district is above the threshold level of districts which

in Dade County have elected Hispanic candidates of choice.

Q. Dr. Lichtman, isn't it the case in the Governor's race, the white crossover vote for Matrinez was 47 percent?

A. I don't recall it being 47. I recall 41. And I talk about that in my affidavit, where I explain, although the white crossover vote is greater in the Martinez race than it is typically in the state legislative races, that would not compensate for the much lower levels of Hispanic cohesion in the Martinez race as opposed to the state legislative races. And that is a ground for my opinion that, in fact, if you would use state legislative races or other races with more typical levels of Hispanic cohesion, you would have found greater levels of support for Hispanic candidates of choice in District 40 in the Brown, Reaves and Hargrett, and, for that matter, in the state districts as well.

* * * *

[73] Q. And what do you know about the citizenship levels for the Hispanic voters in the Hargrett, Browns District 35 and District 40?

A. I haven't studied citizenship levels at all in Dade County. But all of those factors that you talk about would be filtered through the recompiled election results. In other words, to the extent that Hispanics are not citizens and don't vote, they wouldn't be counted in any of the recompiled elections results. So those factors are taken into account.

* * * *

[74] Q. I think it's an important point.

Okay. I assume your bottom line conclusion, if you had reached one, about white turnout, white crossovers, Hispanic cohesiveness, would depend in part on white crossover?

A. Yes, which is likewise, again, since the vote is a function of the black—excuse me—the Hispanic vote and the non-Hispanic vote, filtered through the recompiled

election results, and I think I already testified, in a very [75] conservative way, I think understates the ability of the Hispanic to elect in all of these districts.

* * * *

[80] Q. I understand, Doctor, that your position is that the opportunity is there, if the Hispanic cohesion, plus the white crossover, equals majority. Is that a fair characterization of your—

A. Under those circumstances, the opportunity would certainly be there, which would be reflected in actual election results.

* * * *

[87] MR HEBERT: Your Honor, if I may, I'm going to move to strike all of the questions and answers relating to Republicans on the school board in Dade County and whether they have been successful in elections. I would ask the Court to defer a ruling on my motion, which I'm willing to withdraw, if the state fails to prove it in this case. We are asking this witness to assume facts that, in my judgment, are beyond the scope of what was presented in the congressional case, and if the state goes ahead and proves that, I withdraw my motion. But I do move to strike if they are asking to assume facts that are either inaccurate or they're not willing to prove.

MS. BUTLER: Your Honor, I'm perfectly prepared to [88] have the questions stricken, if it is turns out not to be true.

MR. ZACK: I want to point out to the Court, it is specifically contained in Table 2 of his report. He refers to black Republican opponents, and goes to the very core of this case. If, in fact, the reason people are elected is because they are Democrats or Republicans, it has nothing to do with—

JUDGE VINSON: It is clearly relevant. The only issue is whether it's accurate factually, and the witness said he didn't know. So it's based on an assumption. I'm not sure that we need to go further than that. The motion to strike is denied.

* * * *

[94] Q. Do I take that to mean, Doctor, that these were very substantial majority Hispanic districts?

A. I believe I recommended to the county commission that they target around 65 percent for Hispanics and around 55 for blacks.

Q. So, would you not have included District 40 in the Hargrett, Reaves, Brown plan at 62 percent?

A. No, but that was for an entirely different purpose. As I've explained, we wanted to make sure we had districts that were virtually safe seats; that were safe seats for candidates of choice for Hispanics and blacks, and we erred on the side of making sure that those seats would be safe so there would be no controversy about whether these were absolute rock solid Hispanic and absolute rock solid black seats. When we did the recompiled election returns for Hispanic local candidates in those races, we found in 65 percent districts the Hispanic candidates were overwhelmingly winning, which supports my conclusion that a 62 percent district, while not an absolute lock, not an absolute assured seat, certainly comes well within the range to provide Hispanic voters a realistic potential to elect candidates of their choice.

* * * *

[217] Q Did you examine any alternate plans that have been filed in this case with regard to the House plan?

A Yes, I examined the De Grandy plan with respect to Hispanic House districts.

Q And what did your analysis show with regard to the De Grandy plan insofar as the House is concerned?

A That analysis is laid out in table four of my affidavit, the very last table just before the attachments at the end, and table four shows that the State plan creates nine majority Hispanic House districts within Dade County.

The De Grandy plan creates an additional two House districts within Dade County for a total of 11.

The House districts within the De Grandy plan in terms of Hispanic voting age population range from a

minimum of 64.6 percent, 64.5 percent, that is Districts 109 and 112.

[218] That compares to the State plan where their lowest district in terms of Hispanic voting age population is 63.8, so in terms of voting age population there is at least roughly a 65 percent Hispanic voting age population created for every one of the De Grandy plan districts and the State plan actually dips down ever so slightly lower than that for its minimum districts.

Both the State districts and the De Grandy districts indicate a mean vote for the two base lines of over a 50 percent level, and as I testified to this morning in my view these base line measures are an underestimation of Hispanic voting strengths in districts, and when I looked at local elections, when I was working with Dade County, I found that the 65 percent level a much more substantial majority for candidates of choice of the Hispanic community.

Based on this analysis it is my view that the 11 districts within the De Grandy plan, and likewise the nine districts within State plan, are districts that do provide Hispanics a realistic opportunity to a elect candidates of their choice.

Even the State's own analysis, they actually did a district-by-district analysis of the De Grandy plan districts, which is attachment one, the very next item in my affidavit, they did a district-by-district analysis, and they divided districts into two kinds; one that was called [219] effective minority districts; and the other that was called not effective minorities districts.

And as you can see, none of the 11 districts within the De Grandy plan were rated not effective. All 11 of those districts fell into the effective category by the State's own analysis.

They in turn, however, divided effective minority districts into two separate categories, those they regarded as completely safe for minorities, which they called safe seats, and those which give minorities an equal opportu-

nity to elect candidates of their choice that they call competitive seats.

Both of them, mind you, are effective Hispanic districts, it's just that they further subdivide into safe and competitive, and they do rank most of the De Grandy districts as competitive although effective Hispanic majority districts.

As one final comment though on that ranking, I think there were some real problems with the way the State chose to subdivide effective Hispanic districts into what they call safe districts and competitive districts, and I am quoting here from Florida House of Representatives June 4, 1992, letter to John Dunn, attached report of election data services by Dr. Lisa Handley, June 2, 1992, page four, that report says quote, "A Hispanic House district was considered [220] safe if it was at least 67 percent Hispanic in total population, and if the Hispanic preferred candidate won both of the elections examined." That's the 1986 and the 1990 base line Martinez elections.

First I think the categorization has some conceptual problems. I don't find any foundation for the arbitrary cutoff of 67 percent. Why do you decide if a district falls below 67 percent in total population, it must be rated at minimally a competitive district, and why the Hispanic preferred candidate has to win both of the elections examined?

I know of no foundation for doing that in the literature and I see no foundation for picking out numbers like that here.

In addition, I find that the standards are not consistently applied, and therefore aside from the conceptual problems there is a reliability problem.

We are now at the end of the affidavit. The very last page is the State's analysis of the nine State districts in the State adopted plan, the very last page attachment number two, and you can see on that table that eight of nine of the State plan districts are rated safe rather than competitive.

But if you will look at District 102, the very first district, and you look down the Hispanic population, [221] you see it's 65.6, below the threshold of 67, and yet that district is rated safe.

If you run down the page a little bit farther to District 115, you see that district is 65.3, also below the 67 percent threshold and that district is rated safe.

In addition, if you looked at the Martinez projections, you would see the number of cases the distinction between safe and competitive rests on some paper thin differences, 51 percent, 52 percent is regarded as safe, 48 percent, 49 percent is regarded as competitive.

So while I would agree with your general assessment that both the districts in the State plan and in the De Grandy plan are effective Hispanic majority districts that do give Hispanics realistic potential to elect candidates of choice, I have problems with the further subdivision into safe and competitive.

I don't think that would be a basis for deciding that the De Grandy plan did not give Hispanics increased opportunity to elect candidates of choice. The addition of the two districts all of which are in the 65 percent range or more, does provide such opportunities for Hispanics.

Q Let me ask you this about the De Grandy plan with regard to the creation of Hispanic districts and its relationship to the creation of black districts in the House plan.

[222] Can you tell us what impact, if any, positive or negative that the drawing of the districts in the House plan as set forth in the De Grandy plan impacts on the black districts?

A Again to explain the limits of my testimony with regard to, I compared the De Grandy plan with the State plan. I did not compare it with any other hypothetical alternative simply to determine whether expanding Hispanic opportunities under the De Grandy plan would undermine black opportunities that are provided under the

State passed plan, and I found that the De Grandy plan creates four black House districts in Dade County with non-Hispanic black voting age population of 54.6 percent or more, right around the 55 percent target that I found was, in fact, a safe seat, much less an opportunity seat within Dade County.

Likewise, the State plan creates four black districts in Dade County with non-Hispanic voting age populations of 51 percent or more.

The State's consultants own report regard both the four districts in the De Grandy plan and the four districts in the State plan as safe.

My own analysis in the case the De Grandy districts are certainly provide at least as much opportunity for blacks to elect candidates of their choice as do the districts under the State plan.

[223] Therefore, there does not appear to be any dimunition of black opportunities resulting from the expansion of Hispanic opportunities under the De Grandy plan.

* * * *

[241] Q Okay. My question is again to you, and slow me down if you must, but can you present to this court a legislative election in Dade County in which Hispanic candidates of choice were defeated—I will take out the word usually if it will make it easier—were defeated by the bloc voting of candidates of non-Hispanic voters?

A I will simply repeat my answer. There are one or two examples in non-Hispanic majority districts. There are no examples in the heavily Hispanic majority districts which is the bulk of the elections.

Q My question is, can you present any evidence of any election in a legislative race in Dade County which meets that standard to this court?

A Any election held in a district below 59 percent?

Q Any legislative election, yes.

A I just answered it.

* * * *

[252] BY MR. HEBERT:

Q The census data, Your Honor, shows that the number of Hispanics in 1980 in Dade County was five hundred and eighty thousand nine hundred and ninety-four. That was in 1980.

The total population for the Hispanics in 1990 was nine hundred and fifty-three thousand four hundred seven, an increase from 1980 of 64.1 percent.

Now, Dr. Lichtman, having said that does that kind of growth in the Hispanic population, do you have any reason to believe that there has been no further growth in the Hispanic population in Dade County since the census was drawn?

A I have two comments on the census data. One, there certainly has been further growth; and, secondly, there is certainly an undercount of Hispanics relative to whites, and that has been established generally at about five percent, and so both because of the growth and because of the undercount there is no doubt in my mind the Hispanic population by now is well above 51 percent.

* * * *

[292] Q How many Hispanic representatives, State Representatives are there in Tallahassee? How many did you say?

A I said there are seven from Dade and I think there is one from Hillsborough.

Q And what is his, the one from Hillsborough's party affiliation?

A He is a Democrart.

Q And what are the party affiliations of the State Representatives from Dade County?

A They are all members of the G.O.P.

Q Have you looked or do you know whether the Hispanics outside of Dade County are politically cohesive with the Hispanics inside Dade County?

A No, I did not.

* * * *

TESTIMONY OF WILLIE FRANK LOGAN

TR VOL. III

* * * *

[88] Q There are only two black senators, Senator Meek and Senator Girardeau, is that correct?

A Yes.

Q And both of them supported what is now the Florida plan?

A Yes.

MR. HEBERT: Excuse me, if I could just clarify the form of the question. Supported in what sense?

* * * *

[125] BY MR. POWELL:

Q Representative Burke, how long have you lived in Dade County?

A 22 years.

Q And in your experience in Dade County what group would you say has suffered the greatest from racial discrimination? Would that be Hispanics or blacks?

A I think it's clearly—

MR. HEBERT: That goes beyond the scope of direct.

[126] JUDGE HATCHETT: Objection overruled.

THE WITNESS: I think it clearly has been the African-American community both from this development in terms of social matters, primary to business development, I guess maybe health care, but it's just been clear, and politics, because just during the time since the '58 to '60 when many of the, you know, Cuban brothers came over, what happens is that the largest two cities in Dade County have now, are in effect in control I think of the Cuban community.

The black community I think perhaps has two cities, maybe Florida City and Opa-Locka are two of the smaller cities in which one might call control, but two larger cities are in control politically.

From as far as business development there is actually no, no comparison, and part of it has been because of a discrimination. Bank loans, it has been documented that somehow in the black community you don't get commercial loans, you don't get residential loans.

That is not the case in the Cuban community which even has its, you know, own banks. And part of it again has been part because of discrimination has happened just even, just we are talking about the last 30 years, but—

[127] JUDGE HATCHETT: Thank you, Mr. Burke. You have answered that question.

BY MR. POWELL:

Q Just one moment, Your Honor. Well, actually two more.

You have said you worked with the Cuban-American caucus. Do you know what the political makeup of the Cuban-American caucus is, the membership?

A Yes, there are seven members who are Cuban-Americans from Miami, and Mr. Martinez I think is a member who is I think a Cuban from Tampa.

Q Okay. Are there any Democratic members that are part of the Cuban caucus?

A I believe Mr. Elvin Martinez, he has great participation, he is in the suite but, but I seem to have a friendly relationship.

* * * *

[142] Q Representative Logan, do you have an opinion about whether or not the creation of a fourth Hispanic district in Dade County would have a retrogressive effect on the interest of black voters?

A Yes, I do.

Q What is that opinion?

[143] A Well, the fact of the matter is that if you do a fourth Hispanic district in Dade County due to the fact that you need non-Hispanic people to make up the numbers to include the district, you would deny the opportunity for two black districts wholly within Dade County.

* * * *

[147] and a moment to explain. I believe that the Joint Resolution as adopted by the Supreme Court better represents the black community not only in Dade County but in South Florida. And the reasons for that are very simple: First of all, the seat that's in South Dade, which is only a 30-some odd percent voting age population seat also includes non-Cuban Republican Hispanics, that which are the Mexican community, which have proven over a period of time that they support not only Democratic candidates but they're willing to support black candidates. And that was an example in the Daryl Jones' House seat that also was testified at the South Dade hearing by the American-Mexican community, that they prefer to be in the district that would be represented by a black versus being in a district that was being Republican.

* * * *

THE WITNESS: I suggest to you if you look at the Alcee Hastings race, how he would have done in that particular district; if you looked at the Jesse Jackson race, how he would have done in that particular district; if you look at any Democratic candidate including Pajcic, Chiles, McKay, they all would have won that district Senate 40. So, I suggest to you [148] that it is a seat that effectively would elect a black.

Now, if you don't do a South Dade seat and keep it mostly in South Dade and include the second black seat to be in North Dade, then what you do is instead of having three black seats in South Florida, you only could have two because you must disenfranchise the Fort Lauderdale community from north Broward and south Palm Beach in order to create a second black seat that would include both Dade and Broward.

So, therefore, overall I feel that the Joint Resolution gives the best perspective in South Florida to elect as

many African-American candidates of the choice of the community.

* * * *

[152] A Both of those districts would allow that, I believe. I would say, though, that I think it's a little bit more difficult when you have districts that take in two large urban areas that are separated by about fifteen miles in terms of the cost of campaigning, in terms of the fact that there is little name recognition of legislative or people from Fort Lauderdale versus people from Opalocka. And, therefore, those districts not being as compact are a lot more difficult than those districts that are compact as being proposed by the NAACP.

I also would say to you as relates to the effectiveness of those districts, the caucus including Reaves/Brown suggested that we should try to keep districts within the communities of Dade County, Broward County and other areas, which is what was advocated in the Congressional plans, which is why we've tried to stay away from combining two urban areas when it was unnecessary to create a 50 percent district.

And, therefore, I would say that the two districts in the Reaves/Brown plan are not as safe as districts that would be kept wholly within Dade County.

* * * *

[155] Q Is the district under 40 percent black in voting age population?

A Yes, it is.

Q And isn't it correct that in the Reaves/Brown plan there is an additional district in southern Florida which has I believe a 47 percent black voting age population?

A Yes.

Q All right. So, there is that additional—what we would call an influence district there—isn't that correct? Just

* * * *

[156] A Yes, I can. And, I mean, I can give you valid reasons why, first of all, there was testimony by the Joint

or Reapportionment Task Force which represented the black community in Dade County, that they would prefer to have two black districts within Dade County. There was also testimony in Fort Lauderdale by the black task force, the NAACP, that they would prefer to have a black district based in Fort Lauderdale.

* * * *

[157] Q It's a district that you're not familiar with?

A Yes.

Q You haven't examined it?

A No, I haven't.

MS. WRIGHT: All right. Then I have no further questions.

MR. HEBERT: I'll be very brief.

CROSS EXAMINATION

BY MR. HEBERT:

Q I just really want to clarify one thing, Representative Logan. I believe you testified in your direct testimony that there were two majority black VAP districts in the Dade area under the State's proposed plan?

A No, I did not.

Q Okay. I wanted to make sure that that was not your testimony. In fact, there is only one majority black VAP districts within Dade County under the State's proposed plan as modified by the Supreme Court and ordered by this Court?

A You're correct.

[158] A The black community requested to have two black districts within Dade County 50 percent VAP. We were not able through the legislative process to accomplish that. But the respect and the request of the black community to have two black Senators from Dade County was honored in that the Senate believed and I agreed that there was a second seat created in South Dade that

would effectively elect a black candidate even though it was not 50 percent VAP.

Q And the district that was just identified by Ms. Wright, the Reaves/Brown Senate district that she said was 47.1 percent black, that's a Palm Beach and Hendry district; is that what your understanding is?

A Yes, that's my understanding.

* * * *

[163] Q Now, in your travels through Dade County, have you determined whether Puerto Ricans wish to be considered as part of the Cuban community or the black community?

A Well, and his name was mentioned yesterday, Luis Rojas, who is a Puerto Rican in the Windward area, who is head of the Puerto Rican Democratic Association, testified at the Opa-locka public hearings that the Puerto Ricans in Windward were more politically affiliated with the Democratic party and would prefer to be in the district that would include the black community. We also had similar testimony in South Dade at the public hearing.

Q What about Hispanics, sir?

A The Mexican-American community was represented at South [164] Dade public hearing and they also testified in that particular area in South Dade that they were more politically aligned with the Democratic party and would prefer to be put in a district where they would have a Democratic makeup.

* * * *

[165] A No, sir; it wasn't. The caucus adopted the plan as it was passed by the Florida House of Representatives, which included two black districts within Dade County with a VAP above 50 percent.

Q That's what I wanted to clarify.

A That's the official caucus position.

Q And then what happened after that is the SJR-2 came back to you all?

A Right. And the caucus did not take a position on that particular plan but eleven I believe of the fourteen members of the caucus, including the two Senators and the black member from Souht Dade, agreed that the compromise that was worked out between the House and Senate would effectively still allow blacks to be—a second black to be elected in the Senate seat within Dade County. And, therefore, eleven of the fourteen members supported that Joint Resolution. It was not official caucus position.

Q That is, eleven/fourteen you just cited. And that was the Senate—what we now call the State/Supreme Court plan as modified and approved by this Court; is that correct?

A Yes, sir.

Q Not the HR&B plan?

A Right.

* * * *

[167] Q Representative Logan, what is your position at the present time on the Black Legislative Caucus?

A I'm the Chairman.

Q Does the caucus have an official position with respect to the Reaves/Brown/Hargrett plan?

A They're opposed to it.

* * * *

[170] JUDGE VINSON: The objection is overruled. Go ahead and ask the question.

BY MR. BURR:

Q Just identify the counties that district 28 crosses, please.

A Well, there are nine and there are initials here, some of which I don't recognize. But there is Broward, Glades, Hendry, Indian River, I guess this is Manatee, Okeechobee, Palm Beach. And I don't know what STL is and I'm not sure—

MR. RUSSELL: St. Lucie.

BY MR. BURR:

Q St. Lucie?

A St. Lucie. But there are nine of them and they're all through Central Florida.

MR. ZACK: Excuse me. To clarify, that's Hargrett/Reaves you're referring to?

THE WITNESS: Yes.

MR. BURR: Hargrett/Brown/Reaves.

MR. ZACK: Thank you.

MR. BURR: District 28.

THE WITNESS: Yes.

MR. BURR: Okay.

* * * *

[189] We are not talking about who has the best plan, whether a better plan could have been devised by the minds of men and women. We are talking about whether this plan, the Supreme Court plan as approved by this Court, fails the Gingles test. And it does not. It is almost a litmus test from which we don't need to proceed any further by showing that under the Senate plan you have proportional representation. It is the district 23 argument that is made in Gingles, that you cannot show discriminatory effect when all the evidence shows that you have at least a portion and probably a much greater representation: Half of the Hispanics have half of the seats. In all probability, 20 percent of the blacks will end up with [190] 33 percent of the Senate seats in Dade County, but most certainly statewide it is proportional under any circumstances.

No single plan, not a single one, has demonstrated the ability to create more than two black 51 percent VAP's.

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TESTIMONY OF DARIO MORENO

TR VOL. II

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[5] JUDGE STAFFORD: All right. Mr. Hebert, now let me find out from you before we begin: You're not expanding your case?

MR. HEBERT: No, sir.

JUDGE STAFFORD: Because we asked, put counsel on the record this morning to ask it. The very reason we asked it was to narrow down the focus of this case. And we went to lunch with the idea we were talking about three geographic areas.

Mr. Meros, this is for you.

MR. MEROS: Yes, sir; I understand.

JUDGE STAFFORD: And we heard about Dade, Escambia and something surrounding Alachua. Something happened over lunch. All of a sudden this case just expanded. And I dread to see you walk out of that courtroom because I don't know what you're going to say when you come back.

* * * *

[8] MR. HEBERT: I want to have marked as United States Exhibit 37, a document—and I only have three with me at the time, but they are—if I may represent what they are to the Court: This is the affidavit of Dario Moreno.

* * * *

[13] In this area a colleague of mine, a sociologist, Lisadro Perez, argues you can work, live, do all your daily business, banking, Medicare, groceries, health care, legal aid, everything you want to do in life you can do in Spanish, without speaking a word of English. In fact, in the 1990 census, we found out that Dade County—a majority of Dade [14] County households—the language of choice at home is Spanish, not English.

So, this reflects what has been a dramatic transformation of Dade County's demographics. During the 1980's

over four hundred thousand Latin Americans came into these neighborhoods.

* * * *

A Well, the two most dramatic areas of growth in Dade County for Hispanics are along the beach, Miami Beach. Miami Beach in 1980 census was only 30 percent Hispanic. Now it's 49 percent Hispanic. And the most dramatic growth though has been in this area, this Kendall Lakes, West Kendall area.

* * * *

[16] A Okay. The Hispanics in Dade County are distinguished from Hispanics in the other part of the country by being more conservative and much more Republican than other Hispanic groups, in comparison to Hispanics in California or New York or Texas.

* * * *

[22] Q Describe not only the demographics of the population in each of these districts—and these are senatorial districts we're talking about now—and show us with specificity the identifiable Hispanic populations as they are treated in these senatorial districts.

[23] A Okay. The plan—let me begin on the Beach. That's where I live, the eastern most section of the County. Beginning at the Beach, what the plan does, it creates the 38th district. This used to be—at least most of it, most of Miami—all of Miami Beach and part of the inland—used to be part of the 35th district, which used to be a 55 percent Hispanic district, although it was represented by a non-Hispanic white, Jack Gordon.

What this plan does, it basically expands the district northward all the way to the Dade County line here at Golden Beach and includes the Adventura area, which is a highly non-Hispanic white area of Dade County to the district and removes the Roads section of Little Havana, the south Little Havana area, and parts of Coral

Gables, north Coral Gables, which is also heavily Hispanic. So, the district basically loses thirty-five thousand Hispanics and goes from being 55 percent Hispanic to being 29.9 or about 30 percent Hispanic.

The racial composition of this district is about 30 percent Hispanic, 67 percent black—doesn't even get into double figures—and the rest non-Hispanic whites.

Jack Gordon, who was President of the—who was Chairman of the Senate Reapportionment Committee—lives in that district.

JUDGE VINSON: Before you leave that now, you said it's 55 percent but then it goes down to 30 percent but I'm not [24] sure why it goes down to 30 percent. Does it pick up—

THE WITNESS: Because what it does, it gets rid of thirty-five thousand Hispanics. It gets rid of the thirty-five thousand Hispanics. The district used to include the north Coral Gable area here and the Roads area of Little Havana.

JUDGE VINSON: Chopped off?

THE WITNESS: Chopped off.

Now, moving into the district—the next district is their district 40, which goes from Monroe, includes all of Monroe County, and goes all the way up to a portion of Liberty City, taking US1 to go through this part. It includes Florida City, Homestead, Leisure City, Goulds, most of the pockets of Afro-Americans living in South Dade.

JUDGE STAFFORD: That's now called district 40?

THE WITNESS: Yeah; it used to be 39.

But it also includes the heavily non-Hispanic white area of East Kendall, basically that part of US1, from US1 to the ocean or the bay. And it also cuts through portions of Hispanic neighborhoods. And if you notice on this map, it includes sections of Windward, which is the Puerto Rican neighborhood here, and it—but it also includes this section of basically Cuban American neighborhood, which is part of—which is adjacent to Little Havana.

The racial composition of that district is, I believe, about 33 percent black, 22 percent Hispanic and the rest non- [25] Hispanic whites, over 40 percent. Given racial polarization in which Hispanics would join with non-Hispanic whites to stop an Afro-American candidate and Afro-Americans would join with non-Hispanic whites to stop a Hispanic candidate, which has been the tradition of ethnic polarization, tripartite voter polarization in Dade County, it will be extremely problematic for a minority candidate to pick up this district despite the added—to win in this district—despite the adding of the Liberty City salient here.

Let me—the actual number on the 40th, black is 38 percent black. Excuse me.

JUDGE STAFFORD: And 22 percent Hispanic?

THE WITNESS: And 22 percent Hispanic. But, still, you have about—the largest ethnic group is non-Hispanic whites in that area.

Then let me discuss the 36 senatorial district. The 36 senatorial district currently is represented by Senator Carrie Meek and it is 76 percent black, which raised, of course, the question of packing when reapportionment came up.

What the State plan does, it reduces the number of Afro-Americans because of the Liberty City salient. See, this salient is this area here, because Liberty City, it reduces the percentage of blacks to 49.9 percent of voting age population in the 36 by giving this salient to the 40th congressional district—40th senatorial district.

[26] But what it also does, it adds forty thousand Hispanics to the 36th senatorial district. And it adds this large section of Hispanics going—the Orange Bowl area and east of the airport.

MR. ZACK: Your Honor, I don't know if you want us at this time to correct a matter that is a statistical matter or preserve it for our cross examination, whatever the Court wishes us to do. Either it's a bad mistake or—

JUDGE STAFFORD: Well, what's the problem?

MR. ZACK: There's a—he said in 36 there is 49 percent and 52.5 percent VAP black in 36.

THE WITNESS: 52.5?

MR. ZACK: 52.5. Yes, it is over a majority. Okay. That's the statistics that have been provided.

JUDGE VINSON: It's 52 instead of 49?

MR. ZACK: 52.5.

JUDGE VINSON: Instead of 49.

THE WITNESS: Yeah, it's 52.5.

JUDGE STAFFORD: You stand corrected?

THE WITNESS: Yeah, I stand corrected.

JUDGE STAFFORD: Thank you, Mr. Zack.

THE WITNESS: But the Hispanic population of the district goes from a 26 percent Hispanic VAP to a 33 percent Hispanic VAP in the 36th.

JUDGE STAFFORD: Now, let me regroup on district 36. [27] And any of you—any of you inside the rail here that are actively participating—correct any of these things as they go along, just like Mr. Zack.

All right. Go ahead, Dr. Moreno. Tell me about, again, district 36 again.

THE WITNESS: Okay. Fifty-two percent Afro-American, thirty-three percent Hispanic. It adds basically forty thousand Hispanics from the old 36 district; increases the percentage of Hispanics from 26—

JUDGE STAFFORD: Is this Senator Meek's district then?

THE WITNESS: Yeah, from 26 to 33 Hispanics.

JUDGE STAFFORD: Where did I get the 76 percent black?

THE WITNESS: It used to be 76 percent black. Currently it's 76 percent black.

JUDGE STAFFORD: Is it still called district 36?

THE WITNESS: Yes, it's still 36.

JUDGE STAFFORD: Okay.

JUDGE VINSON: Where are the Hispanics you picked up?

THE WITNESS: The Hispanics are picked up from this area here, east of the airport.

MR. HEBERT: Which, if I may, Your Honor, on the color-filled map, I believe it will be this area I'm pointing to now; would it not?

THE WITNESS: Yes.

JUDGE STAFFORD: The yellow area?

[28] MR. HEBERT: Yes.

THE WITNESS: North Little Havana.

BY MR. HEBERT:

Q Now, while I may, if I could stop you there, since we're on that district, describe for us, if you will, you said this area has a sizable bloc of Hispanic voters?

A Right.

Q Are those voters cohesive voting patterns with the blacks within the district?

A No, they are not.

Q Explain what you mean.

A The Hispanic voters here in precinct analysis I've done with Governor's races and Senate races tend to vote heavily Republican, while the Afro-American voters in these precincts tend to vote Democratic.

The next district is their 39th district, which is a Hialeah district. And this is a super majority Hispanic district. I think it's over 70 percent Hispanic. The 37th is another super majority Hispanic district, over 65 percent Hispanic.

* * * *

[31] JUDGE STAFFORD: It's received.

(Government's Exhibit 7 received into evidence)

* * * *

[33] THE WITNESS: This is 36 district. Okay. You notice there are two figures for blacks, non-Hispanic black VAP and then—which is the one, two, three—fourth column. And that's 49.68, which is my 49 percent, where

I got my 49 percent figure. Mr. Zack's 52 percent figure comes from the sixth column, which is total black.

BY MR. HEBERT:

Q Now, explain why that's important to note the difference between a non-Hispanic black VAP and a total black VAP. Explain why those two numbers are different and what meaning it has.

A My understanding on the literature of black Hispanics is they tend to identify with the language minority stronger than with the racial minority. In fact, the Dominican Republic, which is an almost totally black Hispanic country, there is no one that does black studies. They don't view themselves as black, black Dominicans. That's an example.

* * * *

[34] THE WITNESS: And Hispanic is not a racial category. So, they ask two questions: Your race and they list like seven. And then they ask you are you Hispanic, because you can be a black Hispanic, you can be a white Hispanic and you can be an Indian or a native Hispanic.

BY MR. HEBERT:

Q So, these numbers are from the census itself, which is derived from the individuals who actually fill out their census forms; is that right?

A Right.

Q If you would continue with—

A I finished with the last super majority Hispanic district.

MR. HEBERT: Now, if we could, there is a district—and I need to get one more map, which is the actual Senate plan statewide, so that we can put it up completely so that the Court can see how this Dade County area fits into South Florida. And if I could, could I have this exhibit marked as Government Exhibit 40?

* * * *

[39] THE WITNESS: Oh, I'm sorry. In the De Grandy plan, the 36th senatorial district retains a 55 percent Hispanic VAP. And it does so, as you notice, by including the Roads section of Little Havana into the district. You notice here, it goes inland, here it does not (indicating). Here the Roads section is part of senatorial district 34. Here it's part of senatorial district 35.

So, instead of I guess three super majority Hispanic districts, you have three super majority Hispanic districts: the 33rd, the 40th and the 37th—I mean, the 33rd, the 40th and the 34th and one majority Hispanic district of 55. This is [40] 71 and these are both over 65. So, you have a—you retain a Hispanic majority district; the 71.5, 66.2 and 66.1.

The other difference is—

BY MR. HEBERT:

Q Could we go back and do that just a little slower so that I make sure we understand. The district under this proposed De Grandy plan that is 71.5 percent Hispanic is this purple area?

A Is the 40th.

Q The district that's 66.2 percent Hispanic—

A I think it's the 34th.

Q The green one.

A And the 66.1, which I think is the 33rd, but that could be reversed.

Q And then which one is the 55 percent?

A The 35th.

Q So, there are four districts in that plan that are majority VAP Hispanic?

A Yeah; three super majorities and one majority.

The other difference is that it creates two black majority districts, one the 36th, which basically starts at the Liberty City/Overtown area.

JUDGE STAFFORD: I thought you said 36 was 55 percent Hispanic?

THE WITNESS: What?

[41] JUDGE STAFFORD: I thought you said 36 was 55 percent Hispanic?

THE WITNESS: No, 35th; it's 35th that's 55 percent.

JUDGE STAFFORD: All right. Excuse me.

THE WITNESS: You see the problems of the experts now.

Now, the 36th is a black majority district. It starts off in the Liberty City/Overtown area, parts of Opa-locka, follows US1 and picks up the black pockets of Coconut Grove, South Miami, Perrine, Goulds, Leisure City, Homestead, all the way down to Florida City. So, it follows the pattern of the black Congressional district you approved for Dade.

And then, by up here, by keeping the black sections of Carol City, Opa-locka and uniting them with the black pockets in Broward County, you create a second majority black district, which is the 32nd.

JUDGE STAFFORD: What's the other one called?

THE WITNESS: 36 and 32.

BY MR. HEBERT:

Q What I would like you to do is before, when you were talking about the demographics in Dade County, you talked about a belt of Hispanics. Could you relate the districts as proposed in the De Grandy plan under Exhibit 41 to the demographic belt and describe how it treats that belt of Hispanic population.

A All right. The De Grandy plan includes the South Beach [42] section of Miami Beach, Key Biscayne and the Roads section of Little Havana and puts them in the 35th district. Then you have US1 as a barrier so that the Afro-American district can pick up the black pockets in the south. And then you start with the rest of Little Havana, West Miami, Olympia Heights and parts of Kendall, to create the 34th district.

The 40th district has most of Westchester, all of Sweetwater, wraps around basically unpopulated areas here and comes back to include Kendall Lakes, Kendall (indicating). And so that's how—and Hialeah is basically included into the 33rd district. And it's combined with non-Hispanic white neighborhoods of Miramar and Pembroke Pines to reduce its VAP, so you won't have packing.

So, that's how the—so, basically the Hispanic neighborhoods are respected, treating as contiguous and there is respect for the Hispanic enclave. It does not fractionalize the Hispanic enclave the way the State plan does, does not—you don't have large pockets.

I believe that in the State exhibit you have 28 percent of the Hispanic population of Dade County living in State senatorial districts which they can influence the outcome, while in this plan you have about ten percent of the Hispanics in Dade County living in districts where they can influence the outcome. For Hispanics, that's the difference between.

[43] Here you lose—28 percent of the Hispanic population are submerged in either black or non-Hispanic white districts. Here, only ten percent of the Hispanic population is submerged in non-Hispanic white and black districts.

* * * *

[44] Q Okay. What I'm wondering is, if you know—and if you don't know, just say so—how does the De Grandy plan impact on the black districts drawn in the Dade County area? Are they equally the same population statistics as that set forth in the State's plan or does it weaken those districts for the African American populations?

A I think the two Afro-American districts that are created on—I believe the State plan had a—if you count Hispanic blacks—one majority Hispanic black, one majority black district and one black influence district while the De Grandy plan creates a very strong black majority district, I think 57, I believe is the figure. And it creates

another black majority district incorporating the black pockets of Broward County.

* * * *

[46] Can you identify this plan for us? This is Exhibit 42.

A Yes; this is the Reaves/Brown plan, I believe. And what the Reaves/Brown plan does, it also has four Hispanic majority districts, but instead of the 35th district only being 55 percent Hispanic, it is now 62 percent Hispanic. So, what the—what the Reaves/Brown plan does, it improves—it makes the 35th district a more solidly Hispanic district by removing some of the anglo sections of Miami Beach and putting them in a new 38th district and picking up more of the Little Havana area while retaining super majority Hispanic districts in the 34th, 40th and 33th senatorial district. So, this actually helps Hispanics more.

It also retains two Afro-American districts, a 36th district, much like the De Grandy plan, and a 32nd district, much like the De Grandy plan, including the North Dade black neighborhoods, connecting them with the Broward County Afro-American neighborhoods.

MR. HEBERT: I would like to have marked as Government Exhibit 43 a chart which basically sets forth much of what has been testified to, but it sets out the voting age population of Hispanic population in these Dade County senatorial districts as set forth under the Senate plan, which by the way is now [47] Plan 330, but it is the same percentages. The NAACP had proposed a plan. We're not going to get any testimony about that. The Senate—the Senate's plan itself. I'm sorry, this was an alternative plan in the Senate, the first one. The De Grandy plan and the Reaves/Brown and Hargrett plan. And this is really just for informational purposes. And the statistics are set forth in those books that we have, but this will be Government Exhibit 43.

BY MR. HEBERT:

Q And just to recap, there are four districts, you said, under the Reaves/Brown plan that are over 62 percent Hispanic?

A Sixty-two will be the 35th and then these are the three super majority districts: the 34th, the 40th and the 33rd.

Q And those are voting age population majorities?

A And those are voting age population, yes.

* * * *

[48] Q And if you could, Doctor, could you highlight for us just very quickly how the State's plan compares to the DeGrandy and Reaves/Brown plan in terms of voting age population majority for African Americans?

A Well, for Dade County, the plan only creates—the state plan—only creates one majority Hispanic, one majority black district and an influence district.

* * * *

[49] Q So, there are only two districts where sizable concentrations of African Americans are set forth in the State's proposed plan in the Dade County area? One is 52.5 percent VAP African American and the other is 34.5?

A Right. And the Reaves/Brown, the two districts will be 59.7 and 58.4 being the 36th and 32nd, and in the De Grandy is 57.3 and 57.1, again the 36th—

* * * *

[52] JUDGE STAFFORD: In any event, when you're talking here, when you say Hispanic majority district, you're talking voting age population?

THE WITNESS: Yes, sir. And when I refer to a super majority district, it refers to a district that is over 63, 64 percent, near 65 percent Hispanic, which will probably perform.

JUDGE STAFFORD: Voting age population?

THE WITNESS: Voting age population.

* * * *

[53] JUDGE STAFFORD: Well, go ahead. If that's an objection, it's overruled. Go ahead.

BY MR. HEBERT:

Q Dr. Moreno, is there—have you formed an opinion at all with regard to the districts in the De Grandy plan about whether any of the majority voting age population Hispanic districts are districts in which Hispanic voters, based on past voting patterns, registration rates and turnout rates or whatever, based on that type of election information, whether those districts are likely to result in Hispanic candidates getting elected in an election contest for the Senate?

MR. ZACK: I object to the form. I object to the form of the question. No proper predicate has been laid for his ability to answer that question.

MR. HEBERT: Your Honor, if I may, counsel here is trying to draw a distinction between performing districts and voting age population districts. Counsel knows full well there is no distinction between such things in Dade County and this witness is about to testify to that.

JUDGE STAFFORD: What is your question to the witness?

[54] MR. ZACK: I disagree.

MR. HEBERT: Well, you can disagree.

JUDGE STAFFORD: Now, wait, gentlemen; you address your comments to the bench. What is your question?

BY MR. HEBERT:

Q Do you have an opinion, sir, with regard to whether or not any of these districts in the Dade County area that you've described as voting age population majority districts, whether those districts are districts in which Hispanic voters are likely to effect the outcome of the election?

A I would say—

MR. ZACK: My objection, Your Honor, is no proper predicate has been raised to establish that he has reviewed

that, what is the basis for his review or the basis for his response.

JUDGE STAFFORD: I'll let you handle that on cross examination. Proceed. Objection overruled.

THE WITNESS: I have high confidence that on the 33rd district, the 40th district and the 34th district, Hispanics will be able to elect a candidate of their choice. I have less confidence in the 35th district—there is only a 55 Hispanic VAP—that Hispanics will be able to elect a candidate of their choice.

JUDGE STAFFORD: All right. Next question.

BY MR. HEBERT:

[55] Q All right. I would like to ask you the same question with regard to the Reaves/Brown plan with regard to the Hispanic voting age population district.

A Again, I have high confidence that—I just want to make sure I'm using the rights numbers.

JUDGE STAFFORD: Would your answer be the same?

THE WITNESS: My answer would be the same except I will have greater confidence with a 62 percent VAP in the 35th district that Hispanics will be able to influence the outcome. But I think that that's a problematic assumption because of some of the demographics of that district.

BY MR. HEBERT:

Q Could you describe what some of that is?

A Well, part of the problem with the 35th district—with the 35th senatorial district—as I mentioned earlier, these are a great deal of recent arrivals. A lot of the people from the Mariel boatlift settled there in the early 1980's, especially in the South Beach area. A lot of elderly who are going to die as Cuban citizens, come what may.

So, the Hispanics are less likely to register and less likely to vote in an election than in other parts of Dade County.

Q Is it true that with regard to both the Reaves/Brown and the De Grandy plan that you are—

MR. ZACK: I object to the form of the question. Your [56] Honor, I just can't let him keep testifying in his direct examination.

MR. HEBERT: Well, this witness obviously has given me an answer that I'm entitled to zero in.

JUDGE STAFFORD: Objection overruled. Go ahead.

BY MR. HEBERT:

Q Isn't it true, Dr. Moreno, that with regard to three of the four majority Hispanic districts under both the De Grandy plan and the Reaves/Brown plan, that there—that you are confident that in three of the four districts in Dade County, Hispanic voters will elect their preferred candidate? You don't have any dispute about that; do you?

A I have no dispute about that.

Q All right. And isn't it also true, Dr. Moreno, that with regard to the 4th district in the Reaves/Brown plan, that the Hispanic voters at a minimum have an equal chance of electing a candidate of their choice with the anglos?

MR. ZACK: I've gone the limit.

JUDGE STAFFORD: Okay. The first word ought to be "objection" and then let me handle it.

MR. ZACK: Excuse me, Your Honor?

JUDGE STAFFORD: Your first word when you are up is "objection" and then I'll know how to handle it.

MR. ZACK: Objection.

JUDGE STAFFORD: It is leading; go ahead.

[57] MR. ZACK: Beyond that, I have an additional, that it's not just leading; it misstates the testimony. He said it has ability to influence, which is clearly not the issue in this case.

JUDGE STAFFORD: All right. Let's restate the question. The objection is sustained. Let's restate the question. Come on.

BY MR. HEBERT:

Q With regard to the 4th district—
JUDGE STAFFORD: Which 4th district?
THE WITNESS: The 35th.

BY MR. HEBERT:

Q And, again, the district, the 35th district under Reaves/Brown, which is 62 percent Hispanic, do you know of any 62 percent Hispanic voting age population district in the Dade County area that has not elected a Hispanic?

A I can't answer that.

Q Do you know of any? You can answer that: can't you?

MR. ZACK: Objection, Your Honor. He doesn't like the answer. He answered it. He can't answer it.

JUDGE STAFFORD: Objection overruled. Let's go. You don't know of any; right?

THE WITNESS: I don't know of any.

JUDGE STAFFORD: Next question. Let's go.

MR. HEBERT: Your Honor, at this point I am through [58] with my questions on the Senate.

* * * *

[63] A I did not analyze the NAACP plan so I cannot comment that they are the same.

* * * *

[65] Q And you have already determined that the De Grandy 55 percent does not perform?

A I did not say that. I said that the likelihood of it performing is problematic. I mean, I guess what I am saying is—

* * * *

[66] What I meant by problematic is that currently the district is 55 percent, about 55 percent Hispanic, and, but it's represented by a very powerful non-Hispanic white incumbent who has an ability to raise a lot of money. That incumbent Jack Gordon has since retired.

So in an open election, 55 percent Hispanic VAP is still probably too low to guarantee—to, to say that that district will perform with any level of confidence.

* * * *

[75] Q In the registration data in Dade County on Hispanics, the people that they classify as Hispanics are only those born outside the United States or in Puerto Rico, isn't that correct?

A That is correct.

* * * *

[76] Q All right, sir. Now, what studies did you perform to determine registration and citizenship rates in the H, R & B plan in number 35, district number 35?

A I haven't done any.

* * * *

[77] A No. No, that is not what I said. I said that's a, I said that's a, there were more, there is more, I mean, in your plan the 38 is also an Anglo seat and the40 is the largest ethnic group would be non-Hispanic what's also—

Q Okay. What would happen if this court adopted the De Grandy plan? Would there, there are five hundred eighty-five thousand Anglo voters in Dade County.

If there are four Hispanic seats and two black seats, are there any seats for the five hundred and eighty-five thousand voters that are non-Hispanic and non-black in Dade County?

A Well, you, if you—

Q Any?

A If you look at the De Grandy plan the, their [78] district 39, which is the blue area, light blue area—

* * * *

JUDGE STAFFORD: Okay.

* * * *

[80] Q Okay. My question was, how many of the five hundred eighty-five thousand candidates, five eighty-five thousand citizens, white citizens non-black, non-Hispanic are, can elect a candidate of their choice in Dade County?

* * * *

[82] THE WITNESS: The only way, I didn't bring my census data with me to the stand. In fact, I left it in Miami Beach. But the, whatever the population at Adventura and the population of east Kendall would be the answer to that question.

BY MR. ZACK:

Q We have added it up, and it comes out to four hundred thirteen thousand—five hundred eighty-five thousand.

Does that sound about right to you, sir?

A It sounds a little high.

* * * *

[84] Q Okay. So you don't know that whether they vote Republican or Democrat? You just don't know? Is that what you are telling this court?

* * * *

[85] A The problem is that there are no identifiable Nicaraguan precincts in Miami proper.

Q Of the Colombians, have you made the same study?

A There are no identifiable Colombian precincts in Dade.

* * * *

[86] doesn't make any difference, it doesn't make any difference whether they voted Democrat or Republican.

That race, my question for that case, Your Honor, was whether they voted for the Cuban or the Puerto Rican. That was my question.

In the other cases I said Democrat or Republican, specifically asked for whether the voted for Cuban or the Puerto Rican. You can verify that in the record. That is why I asked it that way, Your Honor.

JUDGE STAFFORD: All right. Let's go on.

BY MR. ZACK:

Q All right. Is your same answer as far as whether the Dominicans vote Democrat or Republican, you don't know?

A We don't know.

Q And as far as Hondurans, you don't know?

A We don't know.

Q And as far as Peruvians, you don't know?

A We don't know.

Q And as far as Guatemalans, you don't know?

A We don't know.

Q And in your table in number three in your report, those groups constitute 40.7 percent or a little less than half of all the Hispanic voters that you are trying to lump together, isn't this correct?

A Yes, that is right, but what we do is because [87] these voters are identified as Hispanic by the Dade County registrar of voters, when we do have voting behavior we don't separate Cubans, we don't separate Latins.

* * * *

[91] A No, that is not correct. We know how Hispanics vote because we do, we do precincts analysis on Hispanic districts that are over 70 percent. These 70 percent Hispanic districts which are not totally Cuban-American districts were mixed.

If you go to Sweetwater, for example, the districts are 50/50, Cuban-American, Nicaraguans. We know how that district looks, the same with Windward, the same with all areas of Dade, the Hispanic, we do the analysis not by Cubans not my Nicaraguans, not by Peruvians, but by Hispanic.

* * * *

[92] Q Okay, sir. Now, tell us in your polarization studies, first of all, are you experienced in conducting an ecological regression analysis?

A No, I am not.

Q Isn't an ecological regression analysis a fundamental principle that must be dealt with in your polarization study?

A No, homogenous precincts, that is what I use.

Q There are two ways of doing it?

A Right.

Q And as far as homogenous precincts is there also, where did you determine, what was your cut off in your homogenous precincts? 80 percent? 90 percent?

A 70 percent.

Q 70 percent? Some people would say 80 percent and 90 percent, too, right?

A The problem is that, as you mentioned yourself, that the Dade County registrar of voters, and this is why I use the homogenous precincts, the Dade County registrar of voters only counts as Hispanic those born outside the United States, and those born in Puerto Rico. That is why there is an undercount of Hispanic voters. So you cannot get Hispanic districts that are 80, 90 percent, because they are not counting all the Hispanics.

So 70 percent Hispanic districts are, will [93] probably be equivalent to 80, 85 percent.

Q Probably, but that is a guess on your part, isn't that—

A It's not a guess, it's an educated guess, when you compare it to the census study which has those same precincts always the on, 92 percent Hispanic.

* * * *

[96] Q Okay. And the races that you looked at, however, the Cubans that ran were the candidates of choice of the Cuban community, isn't that correct?

A That is correct.

[97] Q And they all won?

A Right, but—

Q Isn't it true, sir?

A But the point I am trying to make is that it, that one of the problems you have in these kinds of issues is the fact that minorities are scared away from running when faced with powerful incumbents, in other words, we have—

Q You just said Jack Gordon retired.

A We have gotten so good at redistricting and designing districts to protect incumbents that no Hispanic would challenge Jack Gordon in the 35th congressional district or Plummer in the 39th con—in the 35th senatorial district or Plummer in the 39th senatorial district.

* * * *

[100] Q Okay. Do we have Cuban City-County Commissioners?

A Yes, but—

[101] Do we have a Cuban mayor?

A In Miami?

Q Yes.

A Yes.

Q Do we have three Cuban senators?

A State senators, yes.

Q State senators? Do we have a Cuban congresswoman, the first one ever elected in the United States?

A Yes.

Q And that was from Dade County, right?

A That is correct.

* * * *

[103] A Between 30 and 40, sounds about right.

Q And you would agree, would you not, that they would not be politically adhesive with the elements of Hispanics who are Republicans?

A No, I would not agree with that, because if you look at the election where the Republican Hispanic has ran they have carried in the neighborhood, anywhere between 70 and 80 percent of the Hispanic vote.

Q So you would say that Hispanic vote in Dade County—

A For a, if Hispanic Democrats—if we look at the, if we look at the figures, tend to vote for Hispanic Republicans when they have an opportunity to.

* * * *

[106] A I would guess that they, yes, they are.

Q You would agree that there are a high percentage, and I will use the word "illegal" Hispanic aliens in South Florida, Dade County, is that correct?

A There are a number of illegal aliens in Dade County.

Q They do not vote?

A They do not vote.

Q And they live in pockets in different parts of Dade County, is that correct?

A Yeah. The thing to remember, though, is that these people don't show up on census.

Q I understand.

A You know, so we don't know their numbers or because if you are illegal you are not going to answer the census data.

Q But would you agree that there was adjustment made for that type of residents in the census count?

A I, from my view of the census count, and the census is standing about seventy-four thousand, I don't see an adjustment.

* * * *

[109] Q Okay. Do you have any evidence in Dade County that whites bloc vote against Hispanic Republicans in primaries in Dade County?

A Excuse me.

Q Whites bloc vote against Hispanic Republicans in Republicans primaries in Dade County?

A In Republican primaries, no.

Q Do you have any studies indicating the extent of white bloc votes against Hispanic, and if so which elections?

A Yes, I, the County Commission race between Pinellas and Valdez.

Q In the—

A And the Art Simon race against Orlando Cruz in 1990.

Q Any others?

A And then the unsuccessful attempts Souto-Easterly, Gutman-Leifman, Marina-Braddock, that was successful for County School Board, Clerk of the County Court, Cotarelo-Ader, 1988 State Senate, Souto-Anderson, 1986, Zack-Ros-Lehtinen, Regan-Souto, State House 105, and [110] Marina-Garcia 1984 State Attorney.

Q So your white bloc vote includes based upon the study of eight to 10 elections?

A Yeah.

Q And that's all

A That's all.

Q What did you limit your studies to?

A I limited, I limited my study to in these cases to races where there was an identifiable candidate of choice by Hispanic—

Q Have you seen any reports or done any reports indicating how Martinez, the 1990 gubernatorial candidate would have performed in the proposed De Grandy districts?

A No, I have not.

Q He was Hispanic.

A Excuse me?

* * * *

[124] JUDGE HATCHETT: Please be seated.

Dr. Moreno, everything I am going to ask you about you have already testified to, but the judges have to study at night and we don't want to carry these exhibits away because the lawyers need them, so I am going to ask you some questions so that we may create [125] our own little chart here.

THE WITNESS: Okay.

JUDGE HATCHETT: And I suppose you will need to ask someone to hand you those charts as I ask you these questions.

As to Hispanics in Dade County, today we adopted plan 330 which I call the Supreme Court plan.

THE WITNESS: Uh-huh.

JUDGE HATCHETT: What is the number of majority Hispanic districts under 330, the Supreme Court plan?

THE WITNESS: Three.

JUDGE HATCHETT: What I want you to do now is tell me the district numbers under that plan that you are referring to and the percentages.

THE WITNESS: Okay. Let me find my thing with the--

JUDGE VINSON: You have a chart that has all of that on it.

JUDGE HATCHETT: It's down there someplace.

THE WITNESS: Okay. District 39 would be 76.07 Hispanic VAP under the Senate plan.

--District 34 would be 66.33, and District 37 would be 64.28.

JUDGE HATCHETT: All right. Will you do the same thing for the De Grandy plan, 275?

[126] THE WITNESS: Okay.

JUDGE HATCHETT: How many districts first?

THE WITNESS: It creates five Hispanic majority districts, district—that—leave the numbers there. I'm sorry.

District 40 will be 71.5.

JUDGE STAFFORD: What is that number?

THE WITNES: 40.

JUDGE STAFFORD: 40 is what?

THE WITNESS: 71.5, District 33 and 34, I don't know if it's 66.2—66 percent—

JUDGE HATCHETT: Go ahead.

MR. ZACK: Your Honor, you want us to help here? There's mistakes being made.

JUDGE HATCHETT: Yes, I suppose we do.

MR. ZACK: I, it's district number 33 is 71.5, not 40.

THE WITNESS: Okay.

JUDGE HATCHETT: Is that correct?

MR. ZACK: And it's four districts not five. I mean, I don't know—

THE WITNESS: I said four districts.

JUDGE STAFFORD: You said five.

JUDGE HATCHETT: You said five.

THE WITNESS: Sorry.

[127] MR. ZACK: I don't know. I hate to interrupt but—

JUDGE HATCHETT: Well, any way we can get the information is fine. I just thought that would be a way of doing it.

Let me just ask you and see if we can't all agree on it.

All right. There are four majority Hispanic districts under the De Grandy plan.

Now, let's talk about district number 40. What is the percentage for district 40.

THE WITNESS: 66.

JURGE HATCHETT: 66 Mr. Moreno says. Anyone differ with that?

MR. ZACK: 66.2.

JUDGE HATCHETT: 66.2? District 33?

THE WITNESS: 66.1.

MR. ZACK: 71.53.

JUDGE VINSON: We have already gotten—

JUDGE HATCHETT: Well, I was going back over 33 to make sure we got it right, 71?

MR. ZACK: Point 5.

JUDGE HATCHETT: 71.5? You agree with that, sir?

THE WITNESS: Yeah.

JUDGE HATCHETT: All right. What are the other [128] two districts and what are the percentages?

MR. ZACK: It's 34, Your Honor, is 66.1.

JUDGE HATCHETT: Do you agree with that?

THE WITNESS: And 35 is 55 percent.

JUDGE HATCHETT: 55.7?

JUDGE STAFFORD: Which number?

THE WITNESS: 35.
MR. ZACK: 55.0.
JUDGE HATCHETT: 55.0? 55.7?
THE WITNESS: 55.0 is what I said.
JUDGE HATCHETT: All right.
THE WITNESS: I'm sorry.
JUDGE HATCHETT: I want the same information until the 330 plan as to black districts in Dade County. How many are there?
THE WITNESS: Black districts in there are two, the 32, district 32, the black VAP is 57.1.
JUDGE STAFFORD: 57.1?
THE WITNESS: 57.1. 32—
JUDGE VINSON: Which plan are we talking about now?
THE WITNESS: This is De Grandy.
JUDGE HATCHETT: No, we want first the Senate, 330.
[129] THE WITNESS: Oh, 330?
JUDGE HATCHETT: Under 330.
THE WITNESS: Oh, 330 in the Senate?
MR. ZACK: Your Honor, 36 is 52.5.
JUDGE HATCHETT: 36?
MR. ZACK: Yes, Your Honor.
JUDGE HATCHETT: 52. 5?
MR. ZACK: And 30 is 51.7.
JUDGE HATCHETT: District 30, that is a majority district.
MR. ZACK: Yes, Your Honor, 51.7.
JUDGE HATCHETT: 51.7?
JUDGE STAFFORD: Which district?
THE WITNESS: Broward.
MR. ZACK: Broward and Palm Beach.
JUDGE STAFFORD: The number, please.
MR. ZACK: Excuse me, 30, Your Honor.
JUDGE HATCHETT: In other words, 36 and 30 are the two districts?
MR. ZACK: Yes, Your Honor.

JUDGE HATCHETT: 32 is under the De Grandy plan, is that right? There is no 32? It's a majority black district under the Senate plan, 330?
MR. ZACK: That's correct. There's two majority under each but they are different numbers.
[130] THE WITNESS: Yeah, the, their majority is not in Dade, it's in Broward and West Palm.
JUDGE HATCHETT: Yeah, I am only interested in Dade.
All right. So the, there are two in Dade, 36 and 30 are the district numbers. 36?
THE WITNESS: One in Dade.
MR. RUMBERGER: There is only one in Dade, Your Honor.
JUDGE HATCHETT: One in Dade?
All right. Now, De Grandy the same information, how many black districts?
THE WITNESS: There are two.
JUDGE HATCHETT: All right.
What are the numbers?
THE WITNESS: 36 which is 57.3, and 32 which is 57.1.
MR. ZACK: Your Honor, only a third of 33 is in Dade. That is not correct to say that the Dade County seat for—
JUDGE VINSON: You said 33. You meant 32?
THE WITNESS: That is 32.
MR. ZACK: 33 percent of 32 is only in Dade, the rest is in Broward.
JUDGE VINSON: Well, you are saying district 33, [131] but it's district 33, isn't it?
MR. ZACK: Yes, there is only one each in Dade County.
JUDGE HATCHETT: All right.
JUDGE VINSON: Well, while you are giving us the numbers, can give us the same numbers of the Reaves, Brown?
THE WITNESS: Okay. In the Reaves, Brown plan, they ran—

MR. RUMBERGER: Hold it up.

THE WITNESS: For the Hispanic districts, district 33 is 66.8, district 33 is 66.8, district 34 is 65, District 35 is 65, and district 40 is 62.1.

JUDGE HATCHETT: 63. 1?

MR. CARDENAS: 62.

JUDGE HATCHETT: 62?

JUDGE VINSON: Black percentages?

THE WITNESS: The black percentages in district 32, 58.8, on district 36, 59.7.

JUDGE HATCHETT: Thank you, Doctor.

No other questions.

JUDGE STAFFORD: You may step down.

MR. ZACK: 32 is 44 percent in Dade County.

JUDGE STAFFORD: You may step down, Dr. Moreno.

* * * *

[263] Q Now, what I would like you to do at this point, Doctor, and maybe we can speed this up, I can simply ask you the questions, would you tell us, please, what the differences are in the treatment of the Hispanic population between the State's proposed House plan in the Dade County area and the De Grandy plan as you have outlined it here?

A If we can we can switch to this map which is the State paln and here, no here, and has the old Hispanic, the Hispanic enclave which they talked about yesterday.

I think when I see the State plan as far as its treatment of Hispanics, I am drawn almost immediately to District, State District 116 which is I believe 48 percent Hispanic and the rest non-Hispanic whites, and some black voters here.

The, if you look closely, the line of 116 separates these heavily Hispanic neighborhoods in District [264] 112 from the rest of the Kendall Lakes area and the Kendall area.

So basically what the State plan does it puts a barrier here between these neighbors making up the same, basically what is the same housing development in Kendall Lakes.

In creating District 112, if you will look here at the shape of 112 which includes this, includes all this area here, and heavily Hispanic areas here in Kendall, and then goes through what is basically an empty industrial park Medley, to connect with communities here in Hialeah Gardens.

* * * *

A —the House separates the traditional, what is a continuous neighborhood here in West Kendall, and connects it to Hialeah Gardens which, in fact, there is no direct road transportation between these neighborhoods and this neighborhood up here in Hialeah Gardens.

Similarly in 116, if you notice District 114, [265] State District House District 114, it is almost solidly Hispanic. It is over 78 percent Hispanic.

The little white area you see in Florida International University where it's, you know, empty, so the, in order to create, in order to create a safe district, the House packed 114 and then created this district which basically broke up a continuous neighborhood in Kendall.

Similarly the House, if you notice, created this Hialeah to East Naples District in 102, basically breaking up this part of Hialeah and these Hispanic communities and basically connecting them with non-Hispanic whites in East Kendall.

And as the Court knows, and East Naples, and as you know Naples is a high growth area. That in 102.

Furthermore, the House plan breaks up continuous Hispanic neighborhoods here in District 109 which is a predominantly Afro-American district.

The percentage of Hispanic voters in District 109 is 30 —is a little over 38 percent, I believe, and as you notice the Hispanic neighborhoods here are really, you know, are really part of the same Hialeah neighborhood, all right, coming in here.

Q So that Hispanic population you just referred to is actually put into a majority black voting age population?

A Right, submerged into that district.

[266] And the same happens to a lesser extent in House District 103 where you have the, a very, a large Hispanic community which makes up about 30 percent of District 103, which is actually part of this non-incorporated Northwest Dade-Miami Lakes area here.

It's also submerged in a black neighborhood, and you see it's, it would have been quite easy to just make that part of that district.

Q For the record, I should show that Dr. Moreno is referring to Government Exhibit 50 which is a demographic blow-up of Dade County with the House District superimposed; and, further, that the color codes that we have been dealing with here, Hispanics are in blue, blacks are in red, and those that are yellow are a minority mix similar to the one that we had with the Senate.

One thing that I neglected to do was with the De Grandy plan was give you the four black districts which they also have the percentages of that are majority black voting age population.

District 102 which is 56.—I'm sorry—57.6 percent black. District 103, 57.8 percent black VAP. District 106, 57.7 percent black VAP; and 107, which is 57.3 percent black VAP.

Now, if we could, I would like you to contrast the treatment of the Hispanic population under the plan that [267] you have just explained for us unless—were you through?

A Yeah. Yeah.

Q Okay. And the treatment the Hispanic population under the De Grandy plan, and we will put those two side by side, we have the DeGrandy here on the left-hand side, and we have the State's plan here on the right-hand side, and those are the Exhibits 49, the De Grandy plan, and 48 for the State proposed House plan.

A Okay. To avoid the kind of packing that we saw in District 114, this is the State plan, what the De Grandy

plan does it creates districts which are thinner and longer which includes, if you imagine the Hispanic enclave coming down like this, what the De Grandy plan does, it includes portions of that enclave and then comes down here to pick up non-Hispanic white voters to avoid the problem with packing.

The De Grandy plan also keeps the East—the West Kendall neighborhoods together by creating a Hispanic 116 District.

You don't have the distortion of a district going all the way to Collier County in 102—that you did with the State plan in 102, and similarly important the De Grandy plan reduces the number of Hispanics which are submerged in predominantly black districts, going over, and the 102 district in the De Grandy plan which is 57 percent black is only 14 percent Hispanic.

[268] The 103 district which is 57.8 percent black is only 20.7 percent Hispanic.

The 106 is 24.7. The 107 is 15.2. So the De Grandy plan does a much better job in terms of keeping the Hispanic VAPs in predominantly black districts down from 14 to 24—24.7 percent while the State plan goes from 16.4 percent to 38.8 percent, so I think that is a significant difference between the treatment of Hispanic in the, in both plans.

Q The districts in the State's plan, the black districts that contain a Hispanic population, you said two of them in excess of 30 percent Hispanic.

A Are 109 and 103.

Q Are those Hispanics added to that district in order to increase the population, the minority population of that district so that a black could be elected?

A If you, if you look at my affidavit when I talk about polarized voting, and some of the other expert testimony, the voting behaviors of Dade and Monroe, are that blacks and Hispanic tends to be quite polarized and very rarely come together in a coalition.

So it is more likely to add to ethnic tension by putting that large number, especially at 38 percent Hispanic population in a predominantly black District than to lead to some sort of election coalition.

TESTIMONY OF ALLAN LICHTMAN

TR VOL. III

* * * *

[69] A. Run that by me again.

Q. All right. Has it not been your practice in many cases, in Lyco County, for example, comes to mind—in fact, I think you did this in Hardee County as well, and there are probably other examples—where you have taken the Hispanic support for the Hispanic candidate—

A. Yes.

Q. —added to that the white crossover anticipated—

A. Yes.

Q. —and in this case, the black crossover—

A. Yes.

Q. —and then compared that with the anticipated white vote for the white candidate, black vote for the opponents, and so forth. Is that not your standard practice?

A. I have done both recompiled election results and this technique that you've pointed out, yes.

Q. And did you use that technique in this case?

* * * *

[72] Q. Doctor, would you agree whether Hispanics are going to elect a candidate of their choice in any of the districts as constituted is going to be in part a function of their turnout?

[73] A. Yes.

Q. Would you also agree that turnout is a part of the function of citizenship?

A. Yes.

* * * *

[80] Q. Isn't it the case, then, that if the Hispanics are not the majority of the folks who show up at the polls on election day, that the fate of the Hispanic candidates are going to be in the hands of white voters?

A. No, because it also depends upon the degree of Hispanic cohesion; and, to some extent, of course, you factor in the degree of white support for Hispanic candidates as well. You don't assume that whites vote a hundred percent against Hispanics. That's why you do bloc voting calculations and cohension calculations to determine whether, under a given system, whites vote sufficiently as a bloc to defeat the candidates of choice.

* * * *

[83] Q. Dr. Lichtman, that's not the question I asked you. The question I asked you is: How often in these elections that you looked at that this polarized voting resulted in the defeat of Hispanic candidates?

A. That, I don't know, but most of these elections are in districts with the Hispanic majority. Hispanics are not competing in the white majority districts.

Q. You yourself have indicated the difference between polarization and whether that polarization is legally significant, I believe.

A. Yes.

Q. And it becomes legally significant, Doctor, if it results in the defeat of Hispanic candidates, does it not?

A. That doesn't require Hispanic candidates to be competing in white districts and be defeated. The polarization here is sufficient to show that, in a situation where you have white districts, white bloc voting would be sufficient to defeat an Hispanic candidate of choice in the Hispanic community. Whether or not an Hispanic choose to compete under such circumstances of extreme bloc voting in white districts is another matter.

Q. Doctor, again, we're not answering the question that I would like answered. The question is how—

* * * *

[84] Q. How often have Hispanic candidates of choice been defeated by polarized voting in Dade County, state legislative elections?

A. I can't answer that.

Q. Would you believe that the answer is one, in all of the contests that you've analyzed?

A. That's quite possible, because they are not competing in white districts. They were competing in Hispanic majority districts, which is a typical pattern you find when there is polarized voting.

Q. Would you agree, Doctor, assuming that that's right, one loss, that it is not possible to say in this case that the candidates of Hispanic voters choice usually lose in Dade County?

A. It is possible to say that polarized voting shows that white bloc voting is sufficient to defeat the candidates of choice. If they are not competing, of course, I can't conclude what you are asking me to conclude.

* * * *

[85] Q. You've also said, Doctor, in Paragraph 8, you point out that the black voters haven't provided very much support for Hispanic candidates, either; is that correct?

A. To the extent they were able to isolate information on the black voters, yes.

Q. Are you aware of any contest in which the black voters failure to support Hispanic candidates resulted in that candidate's defeat?

A. The same answer, they are competing in majority Hispanic districts.

Q. Any of them lose?

A. Maybe one.

Q. Do you by any chance know, Doctor, what the political affiliation was of the Hispanic candidates who were successful in the state legislative contest?

A. I haven't gone through one-by-one, but I presume they were mostly Republicans.

Q. Would you accept that they were all Republicans?

[86] A. That sounds feasible.

Q. You have also looked at the school board contests for Dade County; is that correct?

A. To the extent there were any other contests reported by the state, I included them, yes.

Q. Are you aware that no Republican has ever been elected to the Dade County school board?

A. I'm not aware.

Q. I'll ask you if you will accept that as a true statement, no Republican has ever been elected.

A. Fair enough.

Q. Would that suggest to you, then, that in a school board contest—let me back up. Strike that question.

In your analysis of the school board contest, you did show that some Hispanic candidates were not successful?

A. My analysis was not designed to show who was and who was not successful; but, yes, the Hispanic candidates were not successful.

Q. And to your knowledge were these Hispanic candidates running as Republicans?

A. Most likely.

Q. And so, if they were running as Republicans, and no Republicans have ever been elected, is it fair to say that the polarization is just as likely to have been partisan as to have been racial in those contests?

[87] A. I didn't get into the causes of polarization as to why voters voted as they did. I simply looked at how voters voted.

Q. And indeed this was the case, isn't it, that Tiel, a black Republican, received support from the majority of Hispanic voters?

A. We never verified that, but that is certainly possible.

Q. That being the case, wouldn't that be a further indication of partisan rather than racial polarization?

A. I wouldn't draw that distinction that you draw. Certainly, it is the case that partisanship is an influence on voting.

* * * *

[95] Q. But you made no specific determination of the citizenship in Dade County?

A. That is correct.

* * * *

[99] A. A quarter of the district, you said 23 percent?

Q. Something like that, yes, sir.

MR. ZACK: There are only six contained in Dade County one hundred percent, the ones I read. There is one that has a small portion of it.

THE WITNESS: Twenty-three percent.

MR. ZACK: Twenty-three percent, six are contained in Dade County.

THE WITNESS: So it is slightly under half, six and a quarter districts in Dade County, and you've got three, that's a little under half.

BY MS. BUTLER:

Q. Doctor, you have to agree, would you not, that that is awfully close to a proportional representation for Hispanics in Dade County—half of the population, half the districts?

A. It's slightly less than half of the districts, slightly more than half the population.

* * * *

TESTIMONY OF LEON RUSSELL

TR VOL. III

[106] DIRECT EXAMINATION

BY MR. BURR:

Q. Would you state your name for the record, please?

A. Leon W. Russell.

Q. Where do you live, Mr. Russell?

A. In Clearwater.

Q. Do you hold a position at the present time with the Florida State Conference of the NAACP branches?

A. Yes, I'm the first vice president of the state conference.

Q. What role, if any, have you played in the reapportionment process here in Florida over the past year and a-half or two?

A. I have basically directed the state's reapportionment redistricting projects. I have participated in the drawing [107] of maps and, obviously, earlier in this proceeding.

Q. Have you attended any of the public hearings that the House and Senate reapportionment committees held with respect to redistricting?

A. Indeed, I did. I attended the public hearings in St. Petersburg, Tampa, and in Orlando at Valencia Community College, as well as testifying before the House Committee in the State Capitol.

Q. How many NAACP branches are there in the State of Florida, approximately?

A. Currently, there are a hundred and twelve units of the association in the state.

Q. Is it a fair statement that over the past year or two you have been in direct or indirect contact with each one of those branches concerning the redistricting process?

A. We have consistently for the past two years, beginning with our state convention here in Tallahassee, where we had representatives, I believe, of Cobb, Cole and Bell, the House attorneys, come to our state conference to present positions on redistricting relative to the census. We have had numerous workshops on the census as well as continuous workshops at all of our state board meetings relative to the issue.

We went to Macon, Georgia, last March, where we invited members of the joint redistricting subcommittee to join us [108] for a workshop. They did, including staff, who are in this courtroom. We have proceeded during the year to encourage and develop our project through the public hearing process. We have had numerous letters and memoranda to our branches as to what their activities should be, and we have presented obviously plans to this Court and to the Supreme Court of the State of Florida.

Q. Okay. Now, let me ask you about those plans. Did you personally, with the assistance of the NAACP's staff cartographers at the headquarters in Baltimore, draw the NAACP's congressional plan?

A. Yes, we did.

Q. Did you personally, with the assistance of the staff cartographers, draw the legislative plans that have been tendered and filed with the Court in this proceedings?

A. Yes, we did.

Q. Okay. In this redistricting process, what has been the overall goal sought to be achieved by the NAACP?

A. Our goal has been one that probably we can say began way back on the St. Augustine Beach a number of years ago that led ultimately to the passage of the Voting Rights Act; and that is, to increase the number of actual representatives in the Florida legislature and create congressional districts where we could run, as well as to create as much influence for blacks in the State of Florida in the legislative [109] process as we could.

Q. All right, Mr. Russell. I just want to turn now quickly, because we are pressed for time, right to the heart of the issue that we are addressing here today about the Senate, and that is Dade County.

To what extent, if any, has your work and your attention on the redistricting process been focused on Dade County?

A. We have indeed looked at Dade County in numerous versions. We have had presentations from local task forces in Dade County. We have had presentations from local task forces in Dade County. We have had conversations with many legislators from Dade County. We've spent a great deal of time on Dade County.

Q. Do you know how many blacks live in Dade County?

A. Approximately 393,000.

Q. Now, were you in court yesterday when the Department of Justice and the De Grandy plaintiffs presented

their proposal for the creation of four Hispanic majority VAP districts in Dade County?

A. Yes, I was.

Q. What effect, if any, would the creation of such a plan have on black electors in Dade County?

MR. RUMBERGER: Judge, that directly is an elicitation of an expert opinion. We don't have any affidavit or information about this to cross-examine logically on. We would object.

[110] JUDGE VINSON: It certainly may go to the weight, and I may have to give you some leeway in cross-examining, but I'm going to let him testify. I think it is appropriate to do that. Objection is overruled.

THE WITNESS: If four Hispanic districts are drawn in Dade County, it will prevent the drawing of two black districts in Dade County, which for the most part, very most part, can be drawn wholly within Dade County, two majority VAP black districts.

BY MR. BURR:

Q. And would that have a ripple effect on up to Broward County?

A. It certainly would, because there is a black Senate district in Broward and Palm Beach County that, if the plan espoused yesterday is adopted, would force in order to maintain that seat to go on up into Indian River, and then across the state to Fort Myers, as it's been drawn in the Hargrett, Brown and Reaves, and it still is not a majority black VAP seat.

MR. BURR: Your Honor, if I may approach the witness and pass him a document that I would like for him to identify?

JUDGE VINSON: You may.

BY MR. BURR:

Q. Mr. Russell, can you identify that document?

[111] A. This document happens to be a copy of a plan for the Senate which was adopted by the Florida

House of Representatives, but which was never brought up in the Florida Senate. It was developed actually by Representatives Burke and Wallace.

Q. All right. What is your understanding of the ultimate fate of that bill?

A. Ultimately, it just died and was never enacted into law.

Q. Okay. But it is a matter—a part of the public record, public domain; it was introduced and passed by the House, correct?

A. Certainly.

Q. All right. Now, what does that bill, this plan, for which I'm going to refer as the Burke, Wallace plan, what does it provide with respect to black VAP voting age majority districts in the Dade County area? I'm not talking specifically now only in Dade County, but Dade and surrounding counties.

A. This plan creates three majority VAP black Senatorial districts. The first one is District 35, which is in Broward and Palm Beach and has a black VAP of 51—

MR. RUMBERGER: Judge, I'm going to object. We are objecting to any testimony about Broward and Palm Beach, particularly Palm Beach County. That is not subject to the Section 2 attack by anyone, to my knowledge. [112] JUDGE VINSON: Sustained. I realize you may have to spill over into some adjoining counties, but we really are only concerned with Dade County now.

MR. ZACK: Well, Your Honor, the De Grandy has repercussions, and the Hargrett, Reaves, all the way, half the state of Florida.

JUDGE VINSON: We realize that any time you start pulling the string, everything else has to give or take, too. Go ahead.

MR. BURR: Well, Your Honor, just to reiterate what Mr. Zack just said, the very districts that Your Honor is being asked to adopt in the Hargrett, Brown, Reaves plan are not limited to Dade County. There is a spillover effect up a county or two, at least, up the East Coast

corridor as a direct consequence of what is happening in Dade.

JUDGE VINSON: I heard him say there are three voting age population black districts established in all of these. I want to focus on Dade County; and, to the effect that some of them overlap into other counties, necessarily, we will talk about that.

MR. RUMBERGER: There is one other matter that we might take up. This plan has not been submitted to this Court, to my knowledge. This plan has not been provided to us. This is the first time we've talked about this plan, and I have been here for months and months and months in [113] both congressional and these hearings. So we are talking about, for example, giving Mr. Zack the opportunity to have an affidavit from Mr.—from whatever—Dr. Lichtman. We don't have an opportunity. We don't have the plan. We don't have an affidavit. We don't have a report. We have nothing.

MR. BURR: With respect—

JUDGE VINSON: Maybe you better proffer where we are going to go with this witness.

MR. BURR: Okay.

MR. ZACK: Your Honor, may I just make a point for the Court and the record? This was submitted to the Justice Department. There was full knowledge of this.

JUDGE VINSON: Well, the Justice Department, they are now a party. I don't think that really qualifies as being disclosed.

MR. ZACK: I just wanted the Court to be aware.

MR. BURR: Your Honor, in terms of surprise about today's proceedings, Mr. Rumberger and the Justice Department, and everyone else in the courtroom, was given copies of this plan this morning. I mean, it's not that you don't have a copy in front of you to look at; I gave it to you.

MR. RUMBERGER: That's right. As I sat here at 8:30, we got a copy of it. That's not—in fact, just 15

[114] minutes ago was when we finally learned what it was.

MR. BURR: Your Honor, there is a dual purpose for introducing this document.

JUDGE VINSON: Mr. Burr, can we get a number identified on this exhibit?

MR. BURR: Yes. If we could get that marked as NAACP Exhibit Number 1, please.

JUDGE VINSON: Now, before we proceed, Mr. Burr, you need to tell everyone exactly what this witness is going to be testifying about, so that we all know at least where you are headed.

MR. ZACK: Your Honor, may I make a point for the record, sir? At the beginning of the trial, the NAACP specifically said that they had been made representations that the creation of these additional seats would not impact negatively upon blacks, and they said they wanted to carefully review that evidence; and, if they find to the contrary, they wish to present evidence to that effect. And I understand that that's what is occurring here.

MR. BURR: That is precisely what is occurring. We had an open mind about this until the middle of the day yesterday. We listened very carefully to the Justice Department's case, and were attempting to hear them when they said that the plan that is being offered on behalf of the additional Hispanic seats did not negatively impact on [115] blacks.

We conferred with our clients last night. We went back and reviewed these plans. We discussed it with the members of the legislature. And we came to the conclusion at about ten o'clock last night that we vehemently disagree with that representation that has been made to the Court.

Now, there are two reasons for getting into that. First of all, we suggest that this document is relevant in explanation of why Your Honor should not do what you are being asked to do on behalf of the Hispanics in Dade; but, additionally, when you hear this testimony, I hope that you will go the one step further and do what, in

fact, affirmatively is required to be done under Section 2 of the Voting Rights Act; and, that is, create this third black 50 percent or greater VAP district. Both objectives cannot be accomplished in Dade County. They are mutually exclusive. That is a difficult position, I understand, to put this Court in. You have two protected minorities under Section 2, both with legitimate claims.

JUDGE VINSON: I sense that you are interjecting something that really hasn't been pled, Mr. Burr.

MR. BURR: Your Honor, we have a pending lawsuit that has been consolidated with the action that is ongoing here alleging a Section 2 case.

Now, it is true that we do not make specific [116] allegations with respect to Dade County, Broward County, or for that matter as to Escambia County, which later this afternoon we are going to get on board and help the Justice Department carry their water on.

JUDGE VINSON: You are asking us to look at the creation of three black districts with the majority voting age population in this area which hasn't been pled. You haven't pled it.

MR. BURR: Not specifically, no. We can amend the Complaint to plead that specifically, if that's what is required. We didn't know we were going to start a Section 2 case until 8:30 yesterday morning.

JUDGE VINSON: Let's hear from Mr. Cardenas. He's been standing patiently.

MR. CARDENAS: Thank you, Your Honor. Basically, I don't understand counsel's objections as of ten o'clock last night, because our case so far has been to promote two plans in Dade County, either the De Grandy alternative or, more than likely, the Reaves, Brown alternative. Both of those alternatives, which are the ones that the experts and our witnesses have testified to, have been in the possession of counsel since the inception of this process and were in the legislature even before then.

To have reached the conclusion at ten o'clock last night that the Reaves, Brown plan and that the De Grandy

[117] plan were not acceptable, and that they had an open mind is totally incomprehensible to me.

Furthermore, Your Honor, they have presented their own plan, and we have been coplaintiffs based on their plan from the very offset. How they are coming to us and telling us that we have second thoughts as to our own plan, and presenting a new, revised plan on matters as to which have not been pled and have presented them to counsel at 8:30 this morning.

Now, there has got to be somewhere, some way, a way to make a determination that that just doesn't cut it.

MR. BURR: We submitted our own plan in the Section 5 proceedings that were ongoing until yesterday morning. We submitted our own plan before the Supreme Court. Sometime during mid day yesterday this became a Section 2 case.

Now, obviously, the Hispanic plaintiffs would like to have this Court's consideration of the alternatives here limited to its two conveniently chosen alternatives. We are here proposing to Your Honor that there are more than just those two alternatives. There is one that they don't want you to hear about because they don't like the conclusion that it's going to lead you to.

JUDGE VINSON: Everybody is claiming that they are ambushed, including I think the three of us up here. Let's see what Mr. Zack has to say.

[118] MR. ZACK: If I can put this in focus, I can explain why no one is ambushed and I can try and explain where we are in this process. I want to go back—take you back to all of yesterday—it seems a long time ago—which is my statement from "Alice and Wonderland," verdict first, sentence afterwards.

This is the remedy phase of the proceedings. What Mr. Cardenas is trying to do improperly, as he admitted to this Court, is "We're trying to promote two plans." We are in the process at this point of finding whether or not the State of Florida's Supreme Court plan is in violation of Section 2. We strongly submit that we will prove

that it is not the case, and we are entitled to a directed verdict, and we know the Court has said we will have that opportunity, and we will be given it shortly.

If, in fact, we prove there is no Section 2 violation, which we will prove—or they have failed to prove their case is a better way of saying it—then this case is over. If, in fact, after we put on our case, and this Court finds a Section 2 violation, which we believe will never occur, because we don't believe we will reach our case, but at that point it then goes back to the legislature, all right?

Now, these other plans have been put into the pot, and we have been talking about De Grandy and HRB and all [119] that, because they are there to show you what could or could not be done by the legislature if it chose to do that at some point in time.

JUDGE VINSON: That's the first element of the *Gingles* factor.

MR. ZACK: That is absolutely correct.

JUDGE VINSON: Sufficiently large and geographically compact, and the only way you can do that is say this is something we can draw.

MR. ZACK: For that limited purpose, the NAACP's plan is relevant to these proceedings. If, in fact, you find that, as far as the Senate is concerned, they have not met their burden, the case is over. But this is the basis upon which it is being brought to the Court's attention. I believe and I hope that puts in focus exactly where we are.

JUDGE VINSON: All right. Let's see what Mr. Peters has to say.

MR. PETERS: The House concurs with Mr. Zack that the De Grandy Republican set the trap and have been snared. We have been contending all along that they were not in complaints, they were not the answers, they were not matters at issue. It has prejudiced us severely. It is only fair now for them to pay the price.

This is relevant to show the flaw in the analysis [120] of the Department of Justice in protecting the black and

Hispanic rights in Dade County. It is relevant to show the fatal flaw.

MR. ZACK: One last matter. At midnight last night —I forgot to bring this up earlier. At midnight last night we received the Fourth Amended Complaint from De Grandy, and at some point in time the Court has to rule on that issue. We need to know which Complaint we are going to answer on Monday. But I want the Court to know that the last people in the world that should complain about this is the gentleman standing at the microphone.

JUDGE VINSON: What is fair for one side is fair to the other. Let's see what Mr. Rumberger has to say, and then we are going to take a huddle for just a minute.

MR. RUMBERGER: In terms of the snare, Your Honor, Mr. Peters talked about, I've chewed off three legs, and I'm still in the trap. But, in any event, this plan was not offered at the time the scheduling orders required it. The first time we heard about this plan was this morning. Based upon that and based upon the fact that you have given others the opportunity to examine affidavits or review something, we feel that we are being prejudiced.

Currently, there are two plans being considered in addition to what we call the Senate plan—one is De Grandy and one is Reaves, Brown and Hargrett—and that is it. To [121] allow them to come forward now with another plan on this one would simply be violative of our rights and procedures that the Court has previously established. Thank you.

JUDGE VINSON: We have a few other comments, I think. Mr. Abrams?

MR. ABRAMS: If I may, Your Honor—

MR. GREGORY: Once again, Your Honor, on behalf of Reaves, Brown and Hargrett, Ron Gregory. To reaffirm the same, Your Honor, we went to great pains yesterday to identify, and I was allowed to at least to articulate which areas we were going to be joining or

intervening on. The NAACP did not stand up to speak to that point, and it relates to that plan. All of these plans have already been in circulation, thoroughly discussed, thoroughly briefed, and the rest. If there was any surprise, the surprise was the timing of when we were going to get into a Section 2 plan. However, from the summarial point of view, once the decision was made, it then became a matter of presenting the Section 2 complaints and the Section 2 charges and allegations. Dr. Lichtman testified, as the Court noted, testified as a summarial witness. Now you are looking at the possibility of reopening his testimony so that he, in turn, if the Court were to grant this to come in, so he in turn can review this plan with God only knows how many other plans that may come up.

[122] This was a plan that did not come out, was never discussed, it was never disclosed throughout all of the various proceedings where upon we were considering the various state plans for Section 5, Section 2, or whatever, and what is in corroboration with and consistent with their plans, this plan never appeared; it never came up. This is not an ambush. This is an attempt to side-saddle with the NAACP, the House and Senate Democrats trying to push this plan to protect themselves from Section 2 complaints, and we think that should not be allowed.

Reaves, Brown and Hargrett plan, it does have the three black seats in question. If there is an argument as it relates to the three black districts, it has been made; it has been proffered; it has been discussed; it is before you, and we should not now allow this plan to come forward.

MR. ABRAMS: Your Honor, Willie Abrams for the NAACP. We sat here all day yesterday, and we were not here to simply look around the courtroom. We were here to monitor what was going on in Dade County. We started off this proceeding by telling the Court that we are watching what was going to happen in Dade County. The Justice Department, counsel for Reaves, Hargrett and Brown—

JUDGE HATCHETT: Are you counsel with Mr. Burr?

MR. ABRAMS: That's right, with Mr. Burr.

JUDGE HATCHETT: He stated your position. The [123] Court will be in recess for 15 minutes.

(A recess was taken from 11:35 a.m. to 11:40 a.m.)

JUDGE HATCHETT: Please be seated.

JUDGE VINSON: Everyone is back. Mr. Burr, with regard to what you have proposed to do, it is our decision that certainly the regression issue has been injected all the way through. Dr. Moreno, not only did he testify about it, but he was cross-examined on it. Dr. Lichtman was as well. And that certainly is a legitimate issue. But to affirmatively propose the three districts as you have, I think catches everyone by surprise, and that's unfair in our judgment.

So we are going to limit your presentation of evidence solely to the issue of the regression effect upon the establishment of the fourth super-majority or majority Hispanic districts with regard to the regression that might have on the black districts. Is that understood?

MR. BURR: Well, Your Honor, at what point in time will the NAACP be able to lay out for you the three basic threshold elements to a *Gingles* Section 2 case? We have already done two of them.

JUDGE VINSON: If we find that there is, in fact, a Section 2 violation, then this becomes a remedy, among any number of remedies available, upon which the Court can act. I think at that time it would be appropriate for us to [124] consider.

MR. BURR: All right. With respect to the first two prongs of the *Gingles* test, I believe, respectfully, that those were made out through the cross-examination that I did of Dr. Lichtman.

MR. ZACK: We very much object to that, obviously, if that's argument. I don't know what counsel is trying to do.

MR. BURR: In order to establish a third prong, I have to show the Court, through a witness, why it is possible to draw the three black majority VAP districts that I would like to tender evidence. Without the opportunity to tender that evidence, I don't know how Your Honors could make a ruling about whether I have established a prima facie case or not.

MR. ZACK: We are prepared to—

JUDGE VINSON: Wait just a minute.

(Pause.)

JUDGE HATCHETT: Mr. Burr, at what point did you attack the black districts in the Senate plan or the Supreme Court plan or the Florida plan, the plan we adopted yesterday? At what point did you attack these districts?

MR. BURR: Well, on April the 20th, I believe was the date, the NAACP filed its Section 2 case. There I believe was not even a passed Senate Joint Resolution 2G at [125] that point, so the allegations were admittedly general, not specific to particular counties or particular districts. We did not ever anticipate the possibility that we were going to have to flesh out the Section 2 claims and be prepared to come into court and present them to Your Honor today, but in—

JUDGE HATCHETT: That didn't even occur to you when the Justice Department filed a Section 2 claim, when the DeGrandy plaintiffs amended to include a Section 2 claim? It didn't occur to you that you needed to do anything?

MR. BURR: Well, Your Honor, the representations that were made to us consistently was what the Justice Department wished to do in Dade County was not going to negatively impact on the interest of black voters. I announced yesterday morning, we are going to sit here, we are going to listen, we're going to try and keep an open mind about it, but we beg to differ.

JUDGE HATCHETT: Unfortunately, our procedure didn't allow you to keep an open mind; because, if that's true, another party tomorrow will keep an open mind today, and file something tomorrow.

MR. ABRAMS: Your Honor—

JUDGE HATCHETT: Judge Vinson has stated the Court's ruling on this matter. Mr. Burr, would you please proceed in accordance with the Court's ruling?

[126] MR. BURR: We reserve the objection to that, please.

JUDGE HATCHETT: We understand.

MR. BURR: Okay.

JUDGE HATCHETT: And note, however, that Judge Vinson did indicate that in the event a Section 2 violation is found, and this Court is then to the point of giving a remedy, you will be heard on the proper remedy. But at this point, we think that you—unfortunately, our procedure passed you by.

MR. BURR: Okay. In order to establish the third *Gingles* prong, it is incumbent upon us to show to Your Honors what could have—

JUDGE HATCHETT: Mr. Burr, if you are going to ask your witness a question, do so.

MR. BURR: All right, sir.

BY MR. BURR:

Q. Mr. Russell, please just describe in whatever degree of detail you believe that you can consistent with the Court's ruling, why it is the plan, the Section 2 violation or remedy that is being proposed on behalf of the Justice Department in Dade County on behalf of the Hispanics disadvantages black voters?

MR. ZACK: Your Honor, we object to any Section 2 violation of the Senate plan. Our argument was, at the [127] point in time that the Court—exactly what the Court's position is, is our position exactly. How, what we are saying is that any testimony elicited at this time

about Section 2 violations on the Senate plan is impermissible based on the Court's previous ruling.

JUDGE VINSON: Overruled on that. I'm not sure you ought to categorize it as a Section 2 violation, but on the proposal made by the United States, I think he is entitled to address that. So characterize it that way, Mr. Burr.

BY MR. BURR:

Q. How does the proposal that has been advanced on behalf of the United States, in your opinion, disadvantage black voters in Dade County?

A. The proposal suggested by the Justice Department, if it is, in fact, accepted, will prevent the drawing of two majority VAP black districts within Dade County with one extension into Carver Ranches for a black majority VAP district. It will prevent those two districts from being drawn. And, if those two districts are prevented from being drawn, it severely disadvantages us in terms of black representatives in the Florida Senate.

MR. HEBERT: Your Honors, may I interpose an objection at this point? I haven't addressed this issue at all, and it's really—I want to make sure the Court understands the position of the United States clearly. We [128] are not, contrary to the testimony you just heard and contrary to a lot of assertions, we are not asking this Court to adopt a particular plan and impose it on the State of Florida. We have suggested to the Court that the De Grandy plan more fairly reflects Hispanic voting strength in Dade County, and we believe it is an alternative, and the Court could adopt it as an interim measure until the state comes up with a plan of its own; or that the Reaves, Brown plan, which I believe now the testimony we've rounded it out to show that that plan, in fact, even more so fairly reflects Hispanic voting strength, that that is yet another alternative available to the Court.

But I want to make one thing crystal clear, the United States Department of Justice does not propose redistrict-

ing plans and draw plans for the Court or for the State of Florida. It's their duty under the law.

JUDGE VINSON: Thank you, Mr. Hebert. I think that is understood. Perhaps we called it a little bit differently, but I think everybody understands that.

MR. BURR: Your Honor, that's fair enough, but in order for the government to go forward and demonstrate to Your Honors why there is a violation, they must refer to some plan.

JUDGE VINSON: We understand that.

MR. BURR: Now they've referred to two of them. [129] Both of the two accompilsh an Hispanic objective.

JUDGE VINSON: We understand that, Mr. Burr.

MR. ZACK: Your Honor, our objection is that the question goes to maximization in our view. This is a Section 2 proceeding. We are talking about whether there is an opportunity to elect candidates of choice under Section 2 of the Senate plan. That's where we are. We have to focus on that, and we will be given an opportunity to address that issue on directed verdict. So, on that basis I move to strike his previous testimony.

JUDGE VINSON: Objections I think are all overruled. We will proceed now, Mr. Burr, where we left off.

* * * *

[134] BY MR. ZACK:

Q Until—well, the NAACP plan and the Senate plan, as approved by the Supreme Court, now the Supreme Court plan, as approved by this Court as well, was the same as the NAACP plan for all intents and purposes; is that correct?

A Essentially.

Q Essentially the same. And under the Senate plan, there are two black seats; is that correct?

A. That's true.

Q And presently there is only one black senator with a seat with a VAP over 51 percent; is that correct?

A. That's correct.

Q So, there has been an increase in the number of black representation under that?

A Under the SJR?

Q Yes.

* * * *

Q And this Mr. Daryl Jones is a black gentleman?

A Yes.

Q And do you have an opinion as to whether he will win that Senate district number 40?

* * * *

Q I would like for you to do that.

A Well, based on our review of it, I would say that Daryl [136] Jones would be able to win district 40 in the Senate or the SJR as amended. And the reason I would say that is that Mr. Jones is currently in a district in the very same area in the House. That district has a 28 percent black voting age population. And Mr. Jones has won it very well, in running that district very well, had crossover vote. And it would be my opinion that he would do the same in the Senate district with a similar configuration. The Senate district is, I might point out, does have a little higher black VAP.

Q Even higher than the House?

A Yes.

Q And he has announced his candidancy?

A To my knowledge.

* * * *

[137] Q If Daryl Jones is elected, that would be one black Senator from Dade County?

A. That would.

Q And then htere is another black seat in Dade County with over 51 percent VAP?

A District 36.

Q That everybody agrees before.

A Yes.

Q Now, if those two black Senators—whoever their names are—are elected, there would be two black Senators out of six Dade County Senators; isn't that correct?

A If that happens.

Q Right. And that would be approximately thirty-three and a third percent; and the population, the black population of Dade County, is 19.27; isn't that correct?

MR. RUMBERGER: Specifically we would object on this quota kind of relation testimony. That is not relevant.

JUDGE VINSON: Overruled.

BY MR. ZACK:

Q Isn't that correct, sir?

A It would be 33 percent of the Senate seats in Dade County,

* * * *

[139] Fair enough. Now, sir, let me make sure there is anything else. As far as—by the way, there is no incumbent in Senate No. 40; is there, the new Senate No. 40 that Daryl Jones will be running for?

A No, sir, not that I know of, not that I'm aware of.

Q And as far as balancing the concerns of the Hispanic community and the black community and the Anglo community in Dade County, the Supreme Court plan is a fair plan, sir?

* * * *

[140] Q And you would like to see the black community—if Hargrett, Reaves and Brown is approved, you would not have Senate 40 where Daryl Jones would be running from; isn't that correct?

A That's correct.

* * * *

TESTIMONY OF RONALD WEBER

TR VOL. V

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[7] MR. ZACK: We also understand, the court, just as far as travel arrangements, if we go out before 11:59, the court will enter its order I presume either finding or rejecting the claim, Section 2 claim, in a written form and then request remedies. I presume would be—I would ask the court to consider what they intend to do at a break.

And then the other thing is I talked with Mr. Guthrie last night, because I started thinking about Mr. Guthrie, as knowledgeable as he is about how to do the remedy stage, what would be needed for anybody who would submit remedies within the time constraints of the court. And in order for a remedy to be at all submitted that would be of any use to court, the court needs to advise the geographic limitation of that remedy and what the court wishes to accomplish by that remedy, so

[12] THE WITNESS Okay. We both got in Friday and Ms. Butler and I got together. And I think the main question that you asked me at that time was—was it—is it really possible to create a four Hispanic district plan that will work in Dade County, in South Florida, and at the same time not adversely impact upon the opportunity for African-Americans to—to elect candidates of choice again in Dade County, South area.

Q Do you remember whether I asked you to consider citizenship?

A That was an aspect of that that you asked me to do, yes.

Q How did you attempt to deal with the question of citizenship, race, specifically or also exclusively for the Hispanic population in Dade?

[13] A Well, I have always been aware from the first time I got involved in this case and even before that that one of the concerns when you deal with a Hispanic popu-

lation in a voting rights case, there is the question of really how many of those persons of voting age are in fact eligible, registered to vote and participate. And in the *Garza* case, for example, in California, that was a big issue, and I was familiar with that case.

And so in this case I was aware that citizenship might be of concern. And I have thought a lot about how one would go about trying to—to disentangle citizens from noncitizens. And the best information that I am aware of that allows us to do that is available from the U. S. Bureau of the Census. And just recently within the past two months or so the Census Bureau has released what's call a summary Tape File 3 files. And on those files are some of the sample data that they took, I think it's a five percent sample, that deals with the question of citizenship, what number of persons are citizens, what number of persons are noncitizens. Okay. So I knew there was data in that file as well as some data on country of origin for Hispanics.

* * * *

[15] A You really need two essential ingredients. One, you need to have the census data for Dade County which I described earlier, Summary Tape File 3, data on citizens, noncitizen vxariables, I would call it. And second, you need to have some information about the Hispanic population and particularly the country of origin of the Hispanic population. That was going to become very important in my analysis.

Second thing you just need then is you need information about voting age populations on the respective plans that have been offered, the three plans for Dade County, the Florida plan, the—it's the Hargrett, Reaves, Brown plan, and the De Grandy plan, information on the voting age populations in the respective proposed districts, because you are going to take this census data after you have done your analysis and you are going to apply it to just basically take [16] the VAP for the Hispanics and break it into two components, a component that is citizen

and a component that is noncitizen and then answer the question can or are, in those districts that are being—have been adopted in this plan, or proposed in that—those plans, are those districts containing a majority of citizens who are Hispanic within the voting age population. That's the question we want to answer. Very simple question.

Q Did you at some point determine the citizenship for the various groups in Dade County?

A Yes. We undertook an analysis to do this.

* * * *

[18] Q Professor, will you explain for us what Defendant's Exhibit 11 is?

A Yes. It's an exhibit that contains material describing the results of my analysis, with some illustrations to particular districts, in particular the plans, as well as some handwritten, because we simply ran out of typing resources, some handwritten tables that show for each of the Hispanic majority VAP districts in each of the plans, what we would have once we have discounted it, the citizenship, the noncitizens out of the process. Okay. That's what's in that exhibit.

* * * *

[19] to believe there is no citizen, noncitizen data available at the bloc level. Those data are suppressed in the STF 3 tape to project the privacy of the citizens, the persons who responded to the census. So the bloc group —that I—

* * * *

[20] can help me to get through it.

Okay. Start the process by saying, okay, the first thing I asked the staff at the Senate to do, actually we had some help from other resources in the state to do this. I need to give credit to everyone. First thing I asked them to do was to create a data set that would merge data at the track level and at the bloc group level for the basic components. We need it to put into the process. The

percent of VA—the VAP in the district, the voting age population in the district, put that in, that's available in many, many, excuse me, available in many, many places.

Okay. But what we got from this STF 3 tape was the number of citizens and the number of noncitizens at the tract level and the bloc group level. So that's one piece of information. Number of citizens, number of noncitizens so we could create a proportion. Okay.

Q Let me stop you to make sure we clear this up. Is this information broken down by country of origin? I mean, could you tell, for example, a census bloc, how many Cubans are counted in that census bloc group are not citizens?

A No. No. No. We are going to have to use an estimation procedure to do this. All we know in the census bloc group is how many are citizens and how many are noncitizens, but we do not know whether those noncitizens are Cuban, nonCuban, what they are. Okay. If we had that answer we wouldn't even have [21] to do this kind of estimation procedure, we would just go directly to the census and pull those numbers out, create a real simple exhibit and be done with it. Okay. It's just not there, the census didn't ask that.

* * * *

[26] JUDGE STAFFORD: Listen, I will let my colleagues deal the who struck John part of this thing, but I want to—I want to ask you, ma'am, does Section 2 concern itself with the breakdown into subgroups of the language or racial minorities?

MS. BUTLER: Judge, it does that in two respects. The aspect in which we are dealing with at this moment is we are trying to calculate where indeed there are Hispanic majorities in the districts that have been proposed. And because they are, and as we will determine shortly in Dr. Weber's testimony, differential race of citizenship, then the different components of these groups become important. For example, we know that Cubans have a much higher citizenship rate than the other groups.

So if we don't take into account the differential citizenship rates of the group, we have no clue as to where these districts have been created or are indeed majority Hispanic. For example, if you were creating a district made up of Hispanics who turned out to be, say, Nicaraguan, it may very well be a fact that only five percent of those people are actually citizens.

And so the differential rate comes in there. We've got to disaggregate Hispanics into the various subgroups for the purpose of calculating the percentage of the citizen voting age population in the district. That's point one.

The second point is there is no basis for combining [27] them unless they have been shown to be cohesive. And until there has been some proof that these groups actually consider themselves a single group for political purposes, then we've combined them without any basis for it, much the way we might combine American Indians and blacks, because they happen to both be minority groups. So that's the second point.

But at this point we are only talking about the first, how we are going to calculate whether these folks are the majority of the voters of the districts that have been created for them.

* * * *

[28] JUDGE STAFFORD: I guess I get concerned, Ms. Butler.

MS. BUTLER: I understand.

JUDGE STAFFORD: Here, what I think is going to be the last day of testimony we are throwing a new wrinkle into this case.

MS. BUTLER: May I respond?

JUDGE STAFFORD: Yes.

MS. BUTLER: Because I think I can take of care concern. We only really intend to deal with the first of these issues, which is that of citizenship. At that point we are going to offer some testimony about the Hispanic groups, but we are only really going—the main point

of this testimony is to look at citizenship. And in order to look at it accurately, there has to be some disaggregation of those groups. We are not going to be coming in here and be talking about whether—where these groups have come from and where we should aggregate these folks and those folks. That's not what we are going to do. We are simply going to try to give the court an accurate picture of whether the districts that are created are majority Hispanic.

JUDGE STAFFORD: Well, it is the Florida Senates' position that the decisions here were made on something other than voting age population?

MS. BUTLER: I'm sorry. Whose decision, Your Honor?

JUDGE STAFFORD: I mean the decisions which you are [29] seeking to defend.

MR. ZACK: Let me respond to that.

JUDGE STAFFORD: Now, she's representing the Senate on this, she can handle it.

MR. BURR: Yes. Yes, I can certainly handle it.

JUDGE STAFFORD: Each side is entitled to one apostle. Go ahead.

MS. BUTLER: Your Honor, the districts that were created were created through the political process, in terms of the district that I am here to defend. It is not the obligation of the Senate to create districts that are majority Hispanic in terms of citizenship population. The Senate certainly understook to take into account the citizenship in creating supermajority districts. That's been the testimony of everybody that testified, that supermajorities are necessary for taking into account citizenship. The Senate certainly did that in the three majority Hispanic districts that it created. It took citizenship into account and the only way it could at that point which was to up the majorities and make them supermajorities.

JUDGE STAFFORD: Well, I have expressed to you my concern and I will let you handle it from there. Okay.

JUDGE VINSON: Let me just say two things. First of all, regression analysis is not simple, Ms. Butler, In

my humble opinion, it's not simple. And you may have a [30] calculator that has a function that will allow you to do that, that's only part of the problem. To analyze these figures really is going to require some time. And I think these people are disadvantaged in not being able to do that here in the courtroom here at this time.

Second thing is that citizenship is a moving target. You may have a snapshot at 1990, but just for the same reason that we don't use registered voters, we use voting age population, out of that population conceivably every one of them could register to vote, but they may not. Conceivably all of these noncitizens can become citizens in a relatively short period of time. And I point out, too, that the data is suspect in the sense that citizenship in 1990 is in a state of transition because of the way citizenship is being handled. And some of this—some of this may not be the true picture in 1992. So these are all vaceats that—

MS. BUTLER: Your Honor.

JUDGE VINSON: —you should be a ware of.

MS. BUTLER: Let me suggest, when we finish looking at the numbers, that these caveats might not make a great deal of difference.

Of course, the same thing could be said about voting age population. The population gets older every day. And there is a differential rate of people turning from 17 to 18 and deople dying. The population is generally getting older. [31] So anything that can be said about the increase in time for citizens can also be said about voting age, and yet those kind of adjustments are not made. The Supreme Court's mandate is to see that you've got majority of the voters. The language of *Thornburg* is not voting age, it's voters. And if you have to discount the population for people under the age of 18, then it's very difficult to imagine not having to discount for noncitizens. You can take—an example you could create conceivably an entire district in which there was no one who is a citizen.

So you obviously have to take into account in order to create a district that makes any sense for the very people for whom the benefit is supposed to be created. And creating a district supposedly to be helping Hispanic, and turns out it doesn't have any Hispanics in it, you certainly haven't accomplished your objective.

* * * *

[34] (Discussion off the record)

MR. HEBERT: If I may? Counsel has left her notes here.

(Pause)

Your Honors, the Supreme Court in *Thornburg versus Gingles* said that as to the first prong, that the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district. That was the first prong of *Gingles*.

Now, when *Gingles* was first decided by the Supreme Court, everyone thought in 1986 that that probably meant you had to show a majority of the total population, not voting age population. So there were a couple of early cases right in the aftermath of *Gingles* that went to the courts of appeals including one out of Illinois in Springfield where the Seventh Circuit said that it was voting age population that you needed to show a majority of.

And cases that have been heard in federal courts since that time have really used the voting age population statistic as the statistic in the case. And for the very reason that Judge Vinson said, because it is a moving target, there are some people who even if they are citizens don't register. So you don't get into things like voter registration rates, you don't get into voter turnout rates, [35] you don't look at what percent crossover and try to take that into account and demonstrate as a prerequisite to your case that the minority district, Hispanic or black, is going to be able to elect a candidate of your choice. All that is required is that you focus in on voting age population.

So for counsel to advise this court that it's voters that you need to focus on, the reason that you—no court has ever held that. The Supreme Court hasn't addressed the issue except in *Gingles*. And the reason you can't focus on voters is that some courts have said because oftentimes voter registration rates which usually show minority citizens at a depressed level voter registration rates, are themselves often a product of past discrimination. So it would be unfair to use that as the base line.

So I think that voting age population—counsel, Mr. Zack, makes the point that this is the whole focal point that the court is focused on. I think he's confusing compactness which indeed is a very important issue in the court's mind with citizen VAP.

And this issue, as I said before, is well-known to the state. They had these documents available yesterday morning, I don't think it's a defense for them to get before this court and say, well, we thought we were going to put no our case yesterday, so that's why we gave the government their exhibits today. I mean, if they prepared to put their [36] case on yesterday, they could have given us these and I could have at least had an opportunity to do some of the math.

And the reason that I say that, and I have only had a couple of minutes, and yes, I do know how the regression analysis works in a very general way. I'm not a statistician. But for example, I have already done, sitting at the table, a calculation using the method that Dr. Weber apparently uses here.

MS. BUTLER: Your Honor, he is beginning to testify now.

MR. HEBERT: I'm not under oath and this is not evidence. I'm simply trying to make a point here.

JUDGE HATCHETT: Yes. But the issue is notice at this point.

MR. HEBERT: Right. It's notice. And the fact is that even in doing my own calculations, some of the districts that the state has drawn that are majority VAP Hispanic fall below 50 percent.

JUDGE HATCHETT: You're testifying at this point, Mr. Hebert.

MR. HEBERT: All right. I just wanted to show I think you can use these numbers for a lot of different purposes.

MR. PETERS: Briefly as usual, Judge. The court recognizes the fact that the issue here is the first *Gingles* [37] prong, and if they can't prove it. they lose. The second issue is I assume the theory of their case is they have presented more real districts that is district that can elect minority candidate of choice than have the House and Senate. The thing in each of their cases have been a comparison, theirs were more, their's were better. If in fact for the premise of the House case and Senate case that these districts are not real, then there has been no discrimination because what they have produced are illusory Republican gerrymanders which really will disserve the citizens they claim to represent.

Respectfully, Judge, this is relevant to the first *Gingles* prong. It has to be considered by this court to determine if they proved their case. Has to be.

JUDGE HATCHETT: Thank you. The court will leave the bench to confer.

MS. BUTLER: Judge, may I just say a couple more things?

JUDGE HATCHETT: Yes:

MS. BUTLER: I would like to make sure that we've got several distinctions in mind.

First of all, Mr. Hebert refers to voters and then equates that with registered voters. No one is here arguing that this court should consider registered voters in deciding whether a majority has been created.

[38] He also says that *Thornburg* makes reference to majority without making any particular specification. As a matter of fact, when the court explains the reason for this requirement, it uses the word "voters." And this is what it says. It says:

> "The reason the minority group making such a challenge must show a threshold matter that is sufficiently large and geographically compact to constitute a majority of the single member district is this: Unless the minority's voters—voters, voters—possesses the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by it."

So the court's explanation of why it uses the term "majority" clearly refers to voters, and by that it's reasonable to assume potential voters so that we don't get into the question of registration. Obviously registration may change. You change the election structure, when people who previously haven't registered may not register, but that certainly can't be applied to noncitizens.

JUDGE HATCHETT: Thank you, Ms. Butler.

MS. BUTLER: Oh, one other thing. There is a case directly on point. *Romero versus the City Pomona.*

(Discussion off the record)

JUDGE STAFFORD: Familiar with that case.

* * * *

[40] JUDGE HATCHETT: Let's finish this all first. The Court rules that the Senate has provided insufficient notice of this witness' testimony. We will allow Ms. Butler to state into the record what she proposed by this witness and what he would have been expected to testify to.

Before going on, let me announce one other ruling: This Court rules as a matter of law that the relevant inquiry in this case is voting age population.

Ms. Butler, you may make a proffer into the record, if you care to.

MR. PETERS: Judge, is that without regard to citizenship?

JUDGE HATCHETT: We rule as a matter of law that the relevant inquiry in this case is voting age population.

* * * *

[41] MS. BUTLER: Your Honors, do you want me to make my proffer of proof—

JUDGE HATCHETT: If you care to.

MS. BUTLER: I certainly do, Your Honor.—in a [42] particular form rather than through the question and answer this witness that would make a better record?

JUDGE HATCHETT: You may state it into the record without the witness testifying.

MS. BUTLER: Okay. What I expect this witness to establish is that in plan 180 proposed in this case, the Senate district 33—plan 180 being Hargrett, Reaves and Brown—district 33 contains a citizen Hispanic voting age population of 39.4 percent; that district 34 contains a citizen voting age population of 45.1 percent; district 35 contains a citizen—Hispanic citizen voting age population of 37.2 percent and that district 40 contains a citizen voting age population of 38.2 percent.

JUDGE VINSON: You said 37.2. You mean 37.5?

MS. BUTLER: Yes, Your Honor; 37.5. Sorry.

That plan 275, which is also known as the De Grandy plan, their Senate district 33 contains an Hispanic citizen voting age population of 46.5; district 34 contains a citizen Hispanic voting age population of 43.1; that district 35 contains a citizen voting age population of 32.8 and district 40 of 49.0.

JUDGE STAFFORD: Again, that last number?

MS. BUTLER: 49.0.

JUDGE STAFFORD: Thank you.

MS. BUTLER: That the State's plan, the three [43] districts in the State's plan, Senate district 34 contains a Hispanic citizen voting age population of 42.8; district 37, a 49.1 and 39, district 39, of 47.6.

I also expect him to testify that given these numbers, the fourth Hispanic district in the two alternative plans is

certainly not a district in which Hispanics can expect to elect a candidate of their choice; that the three districts in the Senate's plan are indeed such districts in part because they contain Hispanic incumbents and have a record of having elected Hispanic candidates with those particular percentages.

May I ask Dr. Weber if this would indeed have been his testimony to complete my offer? I am making an offer of proof here, Your Honor. I want the record to reflect that this is what my witness would have said.

JUDGE HATCHETT: Well, I don't know what we'll do if he says no.

MS. BUTLER: If he says no, we can—

JUDGE HATCHETT: If you want to run that risk, yes, you may ask him that.

BY MS. BUTLER:

Q Professor Weber, would this have been your testimony?

A Not all.

Q What?

A Not all my testimony.

Q Not all of it. Well, you would have so testified, I [44] assume?

A No, meaning on this issue, no.

* * * *

[46] JUDGE HATCHETT: I want you to understand that our relevancy—you should understand that notice was insufficient, but we thought we would give you a clue, to save you some other time, to tell you that we believe the relevant inquiry is voting age population, because to simply tell you that the notice was insufficient and leave you with that we thought would cause more problems later on. So, yes, the primary ruling is insufficient notice.

* * * *

[47] JUDGE HATCHETT: Yes, it means that citizenship is not important.

* * * *

TESTIMONY OF RONALD WEBER

TR VOL. VI

* * * *

[49] MR. HEBERT: May I have a moment to address the Court on the ruling that you made just before the break?

JUDGE HATCHETT: Yes. We are not going to reargue it.

MR. HEBERT: And I—pardon me?

JUDGE HATCHETT: We are not going to reargue it.

MR. HEBERT: Okay. Correct. And I am not going to get into the argument about what the benchmark ought to be. My concern is with this case and the Supreme Court's review of this case. Now, there is an appeal currently pending in the Supreme Court and our response is due by noon today. So, I have been in touch with the Solicitor General's Office on our position before the Supreme Court.

My concern, however, is that there will be an effort [50] made by the defendants in this case to supplement the record before the Supreme Court with this morning's ruling. And the thrust of their position will be that as a matter of law this Court has ruled that citizen VAP is never a relevant inquiry or whatever instead of as I understand the Court's ruling to be based on the fact that primarily there was insufficient notice given to the people who brought this case.

And I would really like the record to be clear on this, that it's at least an equal amount of both or that it's the notice issue that drove this thing from the get-go. And I'm very—I'm concerned about that.

JUDGE HATCHETT: Let me say it again: The Senate has provided insufficient notice of this witness' testimony. The Court thought it would aid the Senate in going further to give them some direction of how we felt about some other things that we thought would come up in the case.

The Court's direct ruling is the Senate has provided insufficient notice of the expert witness' testimony. That is the ruling of the Court. Anything past that was intended as a gratuity to move the case along.

MR. HEBERT: And I would also want to stand corrected on one point. I went back and read the Pomona case and I think there is some—there is some legitimacy to the State side, that citizenship is sometimes taken into account as a measure, but that's a Ninth Circuit case and we can argue that all day.

[51] JUDGE HATCHETT: We're not going to.

MR. HEBERT: And I know you don't want to. So, I just wanted you to be aware.

JUDGE HATCHETT: We're not going to. However, I don't want to mislead anyone, either: That when it's time to rule on whatever is presented, this Court will rule voting age populations. But as to this witness' testimony, there is insufficient notice.

* * * *

[48] Q Does the plan provide—does the Florida plan provide proportional representation for both African-Americans and Hispanics in Dade County?

A Yes.

Q Doctor, in your experience as a political scientist, are most calculations of proportional representation based on the relationship between votes cast and seats received?

A Yes, they are. I think I need to explain a little bit. A lot of work has been done on that, yes.

Q Do you know roughly what the proportion of the citizen voting age population in Dade County is Hispanic? Would you take a look at what has been marked for identification as Defendants' Exhibit 14?

A Yes. It's 31.2 percent.

Q And if we were to assume that the citizen voting age population is the only population that would translate into votes?

A Yes.

Q Then are Hispanics overly represented in the Florida plan?

A If you use that as a criteria to access proportionality, the relationship between seats and votes, you would suggest that there are two seats for Hispanics.

I can't answer for the other two groups because I [49] don't know the breakdown of the other two groups.

Q So, is it fair to say that to create four Hispanic districts would provide double representation to the citizen voting age population?

A Yes.

* * * *

[50] Q In your opinion as a political scientist or as a political scientist—let me rephrase that. Do you have an opinion as to whether proportional representation provides equal representation for all groups?

A I see those words as being synonymous; proportional is equal.

Q Are you aware of any respected political scientists who would contend otherwise?

A No. Matter of fact, I think a number of respectable political scientists like Rudolph de LaGarza and Rodney Hero and a number of respected—Al Karnig—K-a-r-n-i-g—and African-American political scientist Michael Preston Paula McClain, would all say that that's a silly idea.

* * * *

[60] Q All right. Now, back to Defendants' Exhibit 15. Just tell us what this demonstrates, Doctor, very briefly.

A All it does is summarize the election returns and percentage them for the—one, two, three, four, five, six, seven—eight elections that are contained in the Brace report that was filed with the Court months ago as to who won what [61] particular elections; identifies the Hispanic surname candidates and shows who won.

You will note at the bottom that it says that "All the above candidates who prevailed were the candidate of choice of Dade County Hispanics." And that's all contained in Dr. Brace's report. Not a single one of these are occurrences where the Hispanic-preferred candidate lost.

Q So, sir, to your knowledge have any Hispanic candidates—not Hispanic candidates of choice because we don't know that for sure—but have any Hispanic candidates from the State Senate been defeated?

A Yes. Diminguez, in the first line up there. The actual candidate of choice was Dexter Lehtinen when he ran for the State Senate.

Q Was Lehtinen the candidate of choice for Hispanics?

A Yes, he was.

Q So, in terms of what you know of Hispanic candidates of choice for the State Senate, have any of them been defeated?

A No.

JUDGE VINSON: Let me ask you which plan are these district numbers from?

THE WITNESS: These are analyses of the current districts. These are the actual election returns from the elections in '86, '88 and '90 that were conducted in Dade County involving Hispanic candidates as a candidate.

[63] Q All right. Even if some of them were indeed polarized, the fact remains, does it not, that candidates of choice were indeed elected?

A Yes; yes.

Q Doctor, in your opinion as to percentage of the citizen VAP, are Hispanics registered to vote at rates comparable to those of other groups in the electorate? Is the percentage of the citizen Hispanics registered to vote at a rate comparable to those of others in the electorate?

A Yes, in Dade County.

Q In Dade County; that's correct. As a percentage of the citizen VAP, are Hispanics turning out to vote at

rates comparable to those of other groups in the electorate?

A Yes, and sometimes even greater.

* * * *

[67] Q Are you aware of anything in the record or otherwise that suggests that Cubans in Dade County are in anyway disadvantaged [68] in their ability to participate in the political process and to elect candidates of their choice?

A No.

Q Doctor, I have one more question concerning the creation of four Hispanic districts.

A Yes.

Q Would the creation of a fourth Hispanic district in Dade County in your opinion produce any additional elected candidates of choice for the Hispanic population, creation of a fourth district?

A No, I do not believe so.

Q Would it have any impact on the three districts that have been created in the State's plan?

A Yes, I think that in my judgment to create four Hispanic VAP majority districts in Dade County will result in the dilution of the Hispanic ability to elect candidates of choice in the current districts that now exist or the districts that are in the Florida plan.

Q And in your opinion what would be the impact of the creation of the fourth district on the opportunities for blacks in Dade County to elect candidates of their choice?

A It decimates it.

* * * *

[97] BY MR. HEBERT:

Q It's not your testimony, is it, that Hispanics need to be a majority of the people turning out in order to elect a candidate of their choice or a Hispanic candidate?

A No.

Q Now isn't it also a fact that under the three state Senate districts in the SJR-2(g) plan, as well as the three

[98] districts under the—three of the four districts under the HRB plan, that the turnout statistics come out somewhat similar, do they not?

A No, they do not.

Q Well, let's focus on some of them. Maybe I should amend my question to say I'm not asking for uniformity, but generally speaking, isn't it a fact that with regard to the HRB plan, for example, that the three districts you have listed at the top, the 34, 33 and 40, that the Hispanic percent turnout is 42.9 percent or above in all six of those races, isn't that true?

A Yes.

Q And isn't it also true that the highest is 51.3, and that several are in the high 40's, 49.4, 47.3 and there's a 45.5 and a 43.1, isn't that right.

A Are you talking about the HRB plan.

Q HRB plan, that's what I asked.

A Yes.

Q SJR-2(g), let's compare that. Isn't it a fact that all of the districts are in fact starting at a threshold lower for Hispanic turnout, here 41.7 in the 1990 race, ranging up to a high of 59.6 percent, and you have four of the six elections at 49.2 percent or below for Hispanics, isn't that right?

A Yes.

[99] Q And you also were—you were in the courtroom—you've been in the courtroom throughout most of the testimony in this case, haven't you? Much of it?

A Much of it, I'd say, yes.

Q Did you hear any of the testimony from Hispanic legislators about how they perceived some of the district, senatorial districts as being packed with Hispanic voters?

A I don't recall that testimony.

Q Did you ever hear any testimony in this case about packing Hispanic voters in the district?

A I don't recall that.

Q You didn't hear that. Okay. I understand you to say that elections where presidential candidates are on the

ballot are elections where Hispanic voters tend to turn out in higher numbers, is that true?

A Yes, sir, I did.

Q Is the governor's race in the State of Florida a race which is held in the same year as presidential elections?

A No, it is not, unless there might be some reason of a special election, but normally it isn't.

Q So the one race you did analyze, that 1990 race, you said that was the Governor Martinez race, that was not a race run in a presidential election year when voter turnout for Hispanics would be at its highest, isn't that true?

A That's right, it's a midterm election.

[100] Q And the election prior to that was 1986 and that also involved Governor Martinez, did it not?

A Yes.

Q You didn't analyze that one?

A I did not do any analysis for that election.

Q None whatsoever?

A I can't recall any.

Q Did you run it for voter turnout?

A No, I did not.

Q Did you measure at all the—I'm not sure of the term you used and we'll use the term that you employ, where you plug in past election results into a district, performing statistics or, statistics by which you can measure what has happened in a district as a result of past elections. Do you know what I'm talking about?

A We were talking about that this morning, reconstituted election results.

Q Just make sure that we're talking about the same thing before we head down that road. Constituted election results are what, Doc?

A Reconstituted.

Q Reconstituted?

A That's where you take election returns that were conducted for a particular office and then you put them

into new districts so you can run a report that would show, say, [101] in the old districts, the districts that were in place until this cycle, how the elections came out. And then you reconstitute them into the new districts and you do it for every plan that's ever considered.

Q Have you done that for the races here where you have projected turnout for Hispanics where they would fall in the minority? Have you done that?

A I'm not sure I understand your question, Mr. Hebert.

Q Have you done reconstituted election analysis for these Senate districts here, 39, 37 and 34 in the State's Florida plan, 34, 33, 40 and 35 under the HRB plan, and 40, 33, 34 and 35 under the De Grandy plan? Did you do that?

A No, I have not. May I explain my answer?

Q Yes. I only asked you if you did it and you said no.

A I'm quibbling with you a little bit and I'm not trying to be unresponsive. These are all new reports that the Senate prepares and the House prepares, so simply you take those numbers from those reports.

Q But under the exhibit that you have attached your reputation to, we have virtually every single election presented here, except for the highest percent Hispanic district for the most part, but all of the other selections show Hispanics turning out at a lower than 50 percent level compared to nonHispanics, isn't that right?

A No, I believe you misunderstand that's in this table.

[102] Q Well, is it not a fact that in most of these elections that you have analyzed, you project a Hispanic total voter turnout of less than 50 percent? Isn't that true?

A Yes, but maybe I'm quibbling with words with you. What the last column shows is that you're looking at who has turned out on election day. We're not talking about turnout rates. We're talking about who's turned out and who's in the polling place, and cast a vote in that particular race, and yes, they are suggesting that in many of

these cases you would not have a majority of Hispanics constituting the electorate that day.

Q And your testimony is that Hispanic districts drawn under some of the alternative plans would not, using data such as these voter turnout statistics you've generated, would not give Hispanic voters a certain opportunity to elect their preferred candidate to the State Senate, isn't that right?

A Yes, may I explain my answer?

Q I just asked you yes or no.

A They would not be enough voters by themselves to elect a candidate of choice.

Q But that in part, again, is based on turnout statistics, what you have generated that show in many of these districts, according to your calculations, that Hispanics are less than 50 percent. That certainly is one of the [103] factors you're taking into account?

A Yes, sir, yes, sir.

Q Now, I'd like to do what you didn't do. Let's go first to the State's plan and examine how Governor Martinez did in 1990 in these districts where Hispanics were a minority of the people turning out, because I think it's your position that, at least as to the District 39 there listed under SJR, that you would agree that in that district Hispanic voters are very likely to elect their preferred candidate, would you not?

A They could, if they were relatively cohesive.

Q And you don't—you're not here testifying that Hispanic voters in Dade County are not a politically cohesive unit, are you?

A Their cohesion varies across elections. It's not always the same in every election.

Q That wasn't what I asked. I asked you: You're not testifying that Hispanic voters in Dade County are not politically cohesive? That is not your testimony, is it?

MS. BUTLER: I object, Your Honor, I think that it was his testimony that they were not cohesive.

JUDGE HATCHETT: Objection overruled.

THE WITNESS: I guess I'm confused. Excuse me for—

BY MR. HEBERT:

[104] Q Let me try one other question. You would agree that certainly there are certain parts of Dade County where Hispanic voters are politically cohesive? Can we agree on that much?

A Yes.

Q And can you identify those sections of Dade County where Hispanic voters are not politically cohesive?

A By that you mean not cohesive with other Hispanics?

Q No, I mean Hispanic voters not being politically cohesive.

A I'm having trouble with your words, Mr. Hebert, and excuse me for pronouncing your name wrong, I didn't mean to do that.

Q Well, I see that you one time taught at LSU where they have quite a few Heberts, some more famous than I.

A Well, I guess what's giving me trouble is part of what underlies my examination of all this data is the knowledge that not all Hispanic homogenous precincts behave the same way, okay? And that there will be some Hispanic areas of Dade County. The ones, for example, that are Cuban will act a certain way. There are ones that have fewer Cubans and more non-Cubans that will act different ways, and that's why I'm having some problems with the word cohesive, and I think that's where I'm having trouble.

Q Let's go back then to the Martinez race rather than [105] spend our time on cohesion. Isn't it a fact that in the 1990 race, according to Government Exhibit 7, that in that race, 1990, the very election you analyzed there for Senate District 39, under the State's plan, where you have 1990, 54.3 percent of the Hispanics turning out, according to Government Exhibit 12—Do you see that

figure on your exhibit, 54.3, the second figure down, 1990, under SJR-2(g)?

A Yes, but you're talking—for the purposes of the record, you're talking about Senate Defendant's Exhibit 12, not government exhibit.

Q I'm sorry, right, Senate Defendant's Exhibit, right, you see that figure?

A Yes, sir.

Q And according to Government Exhibit 7, which we have in the record and—55 percent, Martinez won 55 percent and Chiles won 45 percent. So that district is a district in which Martinez carried, is that not true?

A I don't have that exhibit up here. Is that in Dr. Lichtman's report, one of the exhibits he used?

Q No, I don't believe—this is a document the State of Florida—

A May I see it?

MR. HEBERT: May I approach the witness?

JUDGE HATCHETT: Sure.

THE WITNESS: Yes.

[106] BY MR. HEBERT:

Q And I would also ask you, isn't it also true that with regard to District 34, a district that according to your analysis only 41.7 percent of the Hispanics turned out to vote, the Hispanics were only 41.7 percent of those who actually turned out to vote, that Governor Martinez even carried that election in 1990, a nonpresidential election?

A Yes. Governor Martinez barely carried it, 50.1 percent.

Q Let me recite for you also the third district which Governor Martinez received 48.7 percent of the vote in 1990, which was the District 37. So he was just under a majority in the third one. Now I would like to ask you if you have—did you ever examine, even though you did not perform the analysis, but did you examine how

Governor Martinez's 1986 race turned out in those districts?

A I don't recall doing so.

Q Well, according, again, to Government Exhibit 7, Martinez, running in 1986, carried 66.2 percent of the vote in 1986 in District 34, 63 percent of the vote in District 37, and 68.4 percent of the vote in District 39, according to Government's Exhibit 37—I'm sorry, Government's Exhibit 7.

Now you, I believe, have not done any kind of analysis with regard to neither the De Grandy or the Reaves/Brown plan, have you, with respect to whether or not [107] these districts would have resulted in Governor Martinez carrying the election in those districts?

A I understand from Dr. Lichtman's report there were some problems with that.

Q But you didn't perform an analysis, did you?

A I'm sorry to differ with you, but I don't know—I don't perform these analysis because those are already done in the reports. Just like you showed me that exhibit, I could go to that exhibit and take that number out of there and report it, but I don't perform—I did not personally perform those analyses, or no one under my direction performed those analyses.

Q Those analyses, according to the record, Doctor, show that with regard to the De Grandy plan, for example, 1986, Martinez carried District 33, 34 and 40 by over 62 percent of the vote, in District 35 where he captured 52.8 percent of the vote, and under the Reaves/Brown Senate plan for those four Hispanic districts, the record shows, according to Government Exhibit 23, that Governor Martinez carried all four districts that were Hispanic VAP majorities in excess of 60 percent of the vote?

A This was in 1986?

Q Correct.

A Yes.

Q The elections for the Florida House and Senate, are they [108] in presidential election years? Do they get held in presidential election years or in off-presidential election years?

A Depends on whether they're odd numbered or even numbered.

Q Are their presidential elections scheduled in 1992?

A Yes.

Q Are there any Senate and House elections scheduled in 1992?

A Yes, all Senate seats are up this year either for two-year terms or four-years terms.

Q What about the House?

A Of course the House.

Q What about in 1980—I'm sorry 1996, the next presidential elections, will there be any seats up for the Florida State House, State Senate in that year?

A Half of the Senate seats. Twenty up in the regular cycle, and maybe there will be some special elections.

Q And all the House seats, isn't that correct?

A All the House seats, yes.

Q Your calculations of Hispanic turnout, they do not take into account at all, I take it, any degree of crossover voting that takes place? In other words—

A Crossover voting doesn't get involved in turnout estimates, no.

[109] Q So we simply can't look to the turnout statistics and see that Hispanics are in the minority, and even if we conclude there's political cohesion among Hispanics, conclude from that information alone that Hispanics won't be able to elect their preferred candidate, can we?

A No, you can't conclude that.

Q I'd like you to also next focus on Exhibit 13, which is your compactness exhibit. And I tried to listen carefully to what you said, and if I misstate this, please correct my mistakes, but I thought I heard you say that the population polygon test was considered by you to be the best test?

A Well, I said I think you might consider it to be a little better than—you might consider it to be a little better than the others, and the reason for that is that it's more sensitive to the location of the populations, the density of populations, than are the other two methods.

Q In what way is it more sensitive to population density?

A The greater the concentration of the population, in a certain segment of the district, the greater the likelihood that you're going to have compactness. I could illustrate that for you with, let's see, what's the plan that shows it I think, pretty well? Notice in district—I have some difficulty. I'll have to go to a map because the may for the district—

[135] A I have analyzed the turnout for those particular districts, what was the turnout on election day. Okay, for those districts. It is my opinion, based upon that analysis of turnout, the same kind of analysis I did for the Hispanic districts, that those districts are designed—and I'm sorry to use these words, and they may be offensive to some people in the courtroom, but they're designed to waste African American votes.

Q Is that the phenomenon that is known in the—this area of the law as "packing"?

A Yes, sir, they are, they're packed, and there are more African Americans than are necessary to provide a realistic opportunity for African Americans to elect candidates of choice.

Q Do you have an opinion about whether on not this packing [136] phenomenon has an impact on the ability to draw a third district in the South Florida area with a black majority voting age population?

A I believe what I've seen in the two plans, if you go further north from Fort Lauderdale, that neither of them have a VAP majority district that's African Ameri-

can. And furthermore, I did tests of, again, turnout tests for those particular districts, just to see how they would work, and they fail miserably in terms of their ability to put African Americans in control on the general election day.

Q So if I understand you, you believe that the packing of the Districts 32 and 36 does in fact have a negative influence on the ability to create an additional majority seat just to the north?

A That's right, and that's why I said this morning on my direct testimony that I thought what I saw in the attempts to create four Hispanic VAP majority districts in Dade County had a decimating effect on African American voting age population in South Florida.

* * * *

TESTIMONY OF DANIEL WEBSTER

TR VOL. VI

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[75] MR. CROWLEY: Yes, Your Honor. I, as well, am somewhat optimistic on Escambia. One witness has been put on already. The case, I think, would be getting a bit disjointed if we have to do it in three pieces. So that's my problem.

I also wanted to advise the Court of a filing I made just before the—or just after the lunch break. I filed a document entitled notice of Filing of House Representatives Remedial Plan. It's become apparent to us, since we're on this break-neck pace, that when the Court rules, and if it rules adversely to us, that we'd be scrambling to put an alternative before the Court.

So we have filed this in the event that the Court rules adversely to the House Defendants. We do, however, in the notice, expressly reserve all defenses, including the [76] previous articulated position on jurisdiction. Having said that, I would—

JUDGE VINSON: That's a third alternative plan then, is that what that is?

MR. CROWLEY: We're not asking the Court to at all consider this alternative at this time because we think the Florida Plan should survive this scrutiny. This is in the event that the Court rules adversely to us, and I think under the case law, the House Defendants are entitled to submit a fix, if you will, that does the least disruption to the approved portion of the legislative product.

So this is to get ready. We don't—hopefully it won't be necessary from our standpoint, but I did want to bring it to the Court's attention so everybody in the room would know why we are doing this.

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CLOSING ARGUMENTS

TR VOL. VIII

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[8] JUDGE VINSON: We'll grant your motion to participate in an amicus capacity under these conditions: That you take the case as you find it, in the present posture and status. You have to comply with the same procedural requirements concerning evidence as anyone else and there will be no delay in anyway in order to afford you an opportunity to do it. And to the extent that there is oral argument on the remedy, which we anticipate we'll be hearing today, we'll allow you to participate in that. To the extent that there may not be an opportunity to file anything further in the way of affidavits or legal memoranda, you need to be aware of that.

* * * *

[16] Now, the other point is that this morning, Dr. DeGrove testified, and I went through this in some detail in cross examination because I wanted to make it abundantly clear to my satisfaction that he was saying that 55 percent of the Hispanics in—of voting age—in Dade County were non-citizens. And the reason I wanted to

be real clear on that was because I knew it varied with the statistics that Dr. Weber had used.

So, I called Dr. Lichtman. And I had mentioned to the Court I had spoken to him early this morning at 1:30 or so. And what I said to him was the statistics, the percentage now is different. And he said, well, it seems to me we—my affidavit still rebuts that testimony because if you use the statistics used by Dr. Weber, it actually rebuts the information offered by Dr. DeGrove. So, I said, well, then in that case fax me the declaration that you read to me last night and I will read it over and decide whether it does. I did so. And I offered it and I am one hundred percent convinced that it responds not just to the defendants' CVAP case—citizen voting age population case—offered yesterday, but in addition it rebuts the additional testimony on that issue today, which until yesterday we really hadn't gotten into. We went through the C word yesterday for the first time. And it's in rebuttal to all of that that this affidavit goes.

* * * *

[25] (Pause)

MR. HEBERT: May I proceed?

JUDGE HATCHETT: You may proceed; yes, sir.

MR. HEBERT: Thank you. First of all, let me express on behalf of all of the parties the appreciation for the Court's patience in an extraordinary presentation of evidence, multiple parties and multiple counts. We are very grateful for that opportunity.

The issues that are before this Court today are of extreme importance to Hispanic voters in Dade County. They are important issues to black voters in the Dade County area. And, to be sure, they are also important to white voters in Dade County.

But this case is not about Dade County. There is no barrier around the boundaries of Dade County other than a county line, which the state of Florida has routinely crossed for political purposes when it needs to.

The State's defense in this case basically boils down to you carve out Dade County from the state of Florida and then you look to see how many districts you can draw in Dade County.

Well, the state of Florida is governed by the Florida Senate and the Florida House of Representatives. It is not the Dade County Senate. It is the Florida State Senate. And districts that extend beyond the boundaries of [26] Dade County that include Dade County residents have been drawn by many witnesses in this case to be Dade County districts, even if they just include some or a minority of Dade County population.

So, I would like to begin simply by pointing out that this is a case about minority voting rights not simply in Dade County and that the United States does not present this case simply on behalf of Hispanic voters. The United States is deeply concerned that black voters be given their opportunity to participate effectively in the political process under any plan that is put into place by the Florida state government or by this Court.

* * * *

[33] MR. BURR: May it please the Court. The NAACP has appeared before this Court over the past five days to present two challenges to the Florida plan under the United States Constitution and the Voting Rights Act, one having to do with the House district in Escambia County and the second challenge being to the Florida plan's Senate districts in South Florida that have the effect of diluting the voting strentgh of blacks. And I emphasize the word "blacks" as opposed to Hispanics in the South Florida area.

Given what we have been through for the past five days and the record that has developed here, I submit to you that the record is absolutely crystal clear that a Section 2 violation exists with respect to black in South Florida. And not only is that Section 2 violation manifestly clear from the record itself, but I submit to Your Honor that the case that has been made out under Sec-

tion 2 with respect to the Senate districts in South Florida is completely unrebutted. No attorney for either party on either side of this room has come forward in an effort to challenge the evidence that has been proffered to the Court by the NAACP with respect to the Senate problem.

What then exactly is the evidence that comprises the NAACP's Section 2 case in South Florida? What are the elements of a Gingles analysis that we believe the record reflects here? First of all, Mr. Guthrie [34] testified that blacks are sufficiently numerous and geographically compact to permit the drawing of three black majority VAP districts in South Florida. That testimony is in Volume 4, Pages 200 to 202.

Mr. Burke, Representative Burke, came in here this morning and corroborated that testimony. And if that's not enough, NAACP Exhibit No. 1 demonstrates in very graphic form that it is possible to draw three majority black districts. So, I submit to Your Honor that that makes out the element of the first prong under Gingles.

Secondly, Dr. Lichtman testified that blacks in Dade County and the surrounding areas are politically cohesive and, in his words, that they unite in large numbers behind candidates of their choice. That testimony is in Volume 3, Page 35. And if that testimony in and of itself is not sufficient, the evidence in the Congressional phase of this hearing is replete with similar types of testimony not only as to Dade County but the surrounding areas in South Florida. And I submit to Your Honor that that establishes the second prong of the Gingles test.

Thirdly, Dr. Lichtman testified that a pattern exists in South Florida of Hispanics and whites combining their political strength to defeat the election of candidates of blacks' choice. And, there again, if the testimony of Dr. Lichtman standing alone is not sufficient [35] to establish that point, I submit to Your Honor that that is the very essence of what the case of Meek versus Metropolitan Dade County was all about, an 11th Circuit Opinion. And this Court can certainly take judicial notice of the

District Court's record in the Meek case that establishes that point abundantly.

Faced with this record, the NAACP believes that it is incumbent upon this Court to order the creation of three Senate districts in South Florida with a 50 percent or greater black voting age population. In fact, I would submit to Your Honors that Section 2 of the Voting Rights Act requires the creation of just such districts.

Now, the problem for us is that such a remedy presents this Court with a problem, with a dilemma, because Hispanics may—I don't know; I am not casting a value judgment on that—but certainly the Hispanic may have their own separate and independent viable Section 2 claim.

Now, for the sake of argument, assuming that this Court actually is faced with two viable claims in South Florida, how is this Court to resolve that problem? Of course, in an ideal world, the Court could simply order the drawing of four majority Hispanic districts and three majority black districts for the Senate. If it is possible to accomplish that solution, the NAACP supports that solution. NAACP does not seek to come into this Court and [36] advance a claim on behalf of its members at the expense of another minority group.

As I made an announcement to this Court several days ago, the NAACP has drawn a fourth replan and if the parties are ordered to submit proposed remedies to this Court, that will in fact be the NAACP's preferred remedy that will be proffered to this Court. Whether or not anybody can agree on it or buy off on it is another question, but that is the NAACP's preferred remedy.

On the other hand, what happens if this Court ultimately concludes that a 4/3 solution for the Senate in South Florida is not possible? What if there really are two viable and competing and mutually exclusive claims? And I submit to Your Honor that the solution at that point is to in effect give the edge to the minority group that has demonstrated historically the greatest difficulty in achieving political empowerment in South Florida. And

I submit to Your Honor that the record is clear that that is African-Americans.

From the Congressional trial this Court has before it Census data that is replete with evidence that in South Florida, in areas of jobs and housing and education and health care, blacks are very, very seriously disadvantaged and comparably more disadvantaged than are Hispanic groups. The record also is replete with evidence [37] that the Hispanic population in South Florida is growing much more rapidly than the black population of South Florida, thereby making it ever more difficult for blacks to elect their candidates of choice.

On the other hand, the record is conspicuously devoid of any evidence of the type that you heard over the last couple of days about a Hispanic mayor of Miami or a Hispanic chairman of the United Way campaign or Hispanic parts of Miami where it is possible to go in and get the services of doctors and lawyers and architects and accountants and all of the other social services that are needed without ever speaking a word of English.

You haven't heard that type of testimimony, I submit to Your Honor, for the reason that everybody in this courtroom knows and that is there are no such parts of town in Miami or Fort Fort Lauderdale or anywhere in South Florida that a black has access to that sort of—those sorts of social services.

For these reasons and all the other reasons reflected in the record, if this Court is forced to make a choice between creating a third black Senate district or a fourth Hispanic district, we urge Your Honors to adopt the former solution. Thank you.

* * * *

[52] JUDGE HATCHETT: No. Court is in recess.

(Brief recess)

[53] JUDGE HATCHETT: Obviously, we have not been able to come up with a written opinion and I doubt if we're going to be able to do so in the next few hours.

But what I am going to dictate into the record at this time will serve for now as the opinion of the Court. We will also as soon as possible enter a judgment as to the Senate portion of this case to allow any party to who cares to to take an immediate appeal to the Supreme Court. Attached to that judgment will be a certificate pursuant to Rule 54-B, which authorizes an appeal as to less than all of the claims in a case, which will be necessary for anyone who cares to take an appeal.

The Court finds that the plaintiffs have shown a fourth Hispanic district can be drawn in accordance with the Gingles standard, but the plaintiffs have failed to prove that a fourth Hispanic district can be drawn without creating a regressive effect upon Afro-American voters in Dade County and South Florida.

Consequently, under Supreme Court precedent, this Court must give deference to the state policy as expressed in the Florida paln as validated by the Florida Supreme Court.

We will proceed with taking evidence as to the House plan.

MR. ZACK: Thank you, Your Honors. May the [54] Senate retire?

JUDGE HATCHETT: You may.

MR. CROWLEY: Your Honor, as to Escambia County, I preface my remarks by preserving, of course, the jurisdictional arguments we have made as to Dade County. I believe the parties have reached an acceptable resolution of that matter. Language, I think, has been agreed to and the map has been agreed to. And unless someone has something to the contrary to add, I believe that's the current posture of Escambia County.

JUDGE HATCHETT: Mr. Hebert.

MR. HEBERT: We have agreed, as Mr. Crowley says, upon the lines in the map. We have drafted a consent judgment with regard to that part of the case, the language of which is still undergoing some typing, but it has been agreed upon. There are no I believe disputes

from either side now on the language of the agrement. Who is going to actually sign on to it—the United States will agree to it and I leave it to the other parties to advise the Court whether they also wish to—those who have claims with respect to Escambia and have standing to advise the Court whether they also would.

MR. BURR: Your Honor, without having—

JUDGE HATCHETT: This deals only with Escambia as we understand it.

[55] MR. BURR: Yes. Your Honor, without having seen the document and having an opportunity to look at the language, we in principal certainly agree. And after this discussion ends I have a question, if Your Honor will entertain one, having to do with the ruling on the Senate.

MS. WRIGHT: Yes, Your Honor, again with the proviso that we haven't seen the final language yet, but we do agree. We've seen the general outlines and proposed stipulation. It appears to be satisfactory.

MR. RUMBERGER: Same for the De Grandy plaintiffs, Your Honor.

MR. GREGORY: Unfortunately, as you may find because I am advancing the podium, I have a problem. My problem is, Your Honor, that I'm in an ore tenus position to request leave of this Court to withdraw on behalf of one of my three clients. Reaves, Brown and Hargrett were the plaintiff intervenors in the various cases. Because of a difference of opinion, shall we say, I am authorized to sign the consent judgment, which I have seen, which I understand the Government wishes to make one final correction to reflect what I am saying now, and I am authorized to sign it on behalf of State Representatives Corrine Brown and James Hargrett, Jr.

However, I'm seeking leave to withdraw as attorney of record for Darryl Reaves because he has not [56] authorized me—in fact, he has disagreed with the signing of the agreement. I have discussed the same further with Representative Reaves. I thought he would be here. I know

he is around, apparently not knowing we're back in session. And he understood.

And there were two attorneys of record for the three. The other attorney, unfortunately, Henry Hunter, is literally out of the country and, therefore, unable to be here and to take over any of the last minute comments or anything else to be said on his behalf assuming the Court would grant the same. But I feel that I am in an uncomfortable situation and I cannot represent his interest at this point as it relates to the Escambia plan since he wants to—since he does not want to go along with the consent judgment which I believe will dispose of the case and the other two do.

And, again, I have also fully discussed this entire scenario with all three clients, individually and collectively. It is after much consideration that I have to move to do this now. I did not do so, although I was aware prior to our closing arguments on the State Senate part, because I was still of record for him. There was no conflict as it relates to the State Senate considerations or anything in Dade County. So, the request would be only as it relates to Escambia County but not as it relates to [57] Dade County.

JUDGE HATCHETT: Exactly what is your motion?

MR. GREGORY: The motion is to withdraw as attorney of record for Darryl Reaves as relates to Escambia County portions of the Section 2 complaint only.

JUDGE HATCHETT: And you would remain as to Dade County?

MR. GREGORY: Yes, sir; there is no conflict between the three as relates to Dade County, Senate or House in Dade County.

(Pause)

MR. GREGORY: I have also communicated the same understanding to the other plaintiffs as well as to defendants.

JUDGE HATCHETT: Well, let's ask you a few questions.

MR. GREGORY: Yes, sir.

JUDGE HATCHETT: I guess the easiest way to ask you is what is the—how do your clients have standing as to Escambia County in the first place? None of your clients reside in that county; do they?

MR. GREGORY: None of the three reside in Escambia County; that is correct. Standing is not contested, is not an issue, was never raised. Both have been involved in Escambia issues as Representatives. They [58] have voted on some things. Standing has been shown in that way, although they don't live there.

JUDGE HATCHETT: Very well.

MR. CROWLEY: Your Honor, I do believe we have a pending motion to dismiss directed specifically to the standing of these three clients. Given we're in settlement posture with two of them, I don't argue that. But as to Mr. Reaves, he does live in Miami. That's of record. With the settlement of this lawsuit, there is no case in controversy. And I think as to him he should be dismissed from the action.

MR. GREGORY: Understandably, I don't want to comment on that.

JUDGE HATCHETT: But you do agree that such a motion is pending?

MR. GREGORY: I am not aware of it. I am not aware that a motion is pending as relates to those three persons.

JUDGE HATCHETT: Do you make that motion now?

MR. CROWLEY: Yes, Your Honor, I make that moiton now, that they be dismissed or that Representative Reaves be dismissed for lack of standing.

JUDGE STAFFORD: As to Escambia?

MR. CROWLEY: As to Escambia only.

MR. GREGORY: I only ask that the matter not be [59] argued because I don't want to argue—

JUDGE HATCHETT: I understand. The motion is granted.

MR. GREGORY: My motion?

JUDGE HATCHETT: No. The State's motion they just moved.

JUDGE STAFFORD: And mooted your motion.

JUDGE HATCHETT: On the basis of standing, that you had no standing, to dismiss you as to Escambia County, that motion has been granted and that resolves your conflict.

MR. GREGORY: That was granted as to Darryl Reaves only; is that correct?

JUDGE HATCHETT: Yes.

MR. GREGORY: Okay. That was the request, Your Honor. Thank you.

JUDGE HATCHETT: Thank you.

MR. BURR: May it please the Court? On the ruling with respect to the Senate issues, as I understand the Court's ruling, it addressed the plaintiffs' claims. I believe you said the plaintiffs have proven various things. Could you please clarify which of the palintiffs that is in reference to? It appears from the substance of the order to involve only the plaintiff claims of the Government or the De Grandy plaintiffs. And I need to know what the [60] status of the NAACP's Section 2 case is because, obviously, the NAACP was not attempting to prove anything on behalf of Hispanic districts, quite the contrary.

JUDGE HATCHETT: One reason we write these things out and I read them to you is because it is a Three-Judge Court. And sometimes we don't agree on exact wording, the same as you, but I think we have a legitimate question here. And let me see if we can amend it and then I will read it to you again because that way it's the only way I can be sure that the three of us are in complete agreement. So, if you will just wait one minute.

Yes.

MR. WAAS: If you want to get into more details with respect to the Senate case, I think we ought to see if we can get Senate counsel back in here.

JUDGE HATCHETT: I don't think we need them for us to clarify the plaintiffs that we are speaking of.

(Pause)

JUDGE HATCHETT: Mr. Burr, the Court will be able to say that it has at this time ruled against all plaintiffs and in a written order there may be more definition as to exactly the rulings as to each claim, but at this point we have ruled against all plaintiffs as to the Senate.

MR. BURR: Thank you, Your Honor.

[61] MR. RUMBERGER: Judge, are you going to proceed on now to the House districts?

JUDGE HATCHETT: Yes.

MR. RUMBERGER: Just before we do, I would like to make a motion for reconsideration, very briefly, and to note that we have a plan prepared for the remedial portion, had we got to that, that would show four Hispanic districts, 65.3, 64.60 and 69.2; and three black districts with the following voting age populations: 52.5, 53.3 and 52.3, that are attached to the affidavit of Rockie Pennington, who had been commissioned by us to do this for the remedial stage.

So, at this point we have four Hispanic districts and three black VAP districts which is more than sufficient to meet any task that the Court might wish to impose and certainly would be absolutely non-retrogressive in form.

JUDGE HATCHETT: Motion for reconsideration is denied.

* * * *

[64] MR. HEBERT: Thank you. The United States stands before the Court today with regard to the House plan contending that the Florida House of Representatives has drafted a plan which minimizes minority voting strength in the Dade County/South Florida area. Now, why does it—why do I use that term "minimize"?

Under the Voting Rights Act, there are many different types of vote dilution claims that can be made. You can take a concentrated group of politically cohesive minorities and you can fracture them into a number of different

districts and in so doing deprive that cohesive minority group of a realistic opportunity to elect people of their choice, candidates of their choice, to public office by putting them in a numerical minority.

[65] There are other ways to dilute or minimize minority voting strength and that is to pack districts, particularly in the inner city, with such heavy concentrations of minority group citizens that there are not a sufficient number of minority group citizens left who could elect a candidate of their choice in a remaining district. Ordinarily when that's done, it is done by placing those persons into a—usually a white district. But as has been shown in this case, it can also be done by placing them into a black minority district or a majority black district.

In this case the record shows that Hispanics vote cohesively and that in a couple of the districts proposed by the State that are going to likely elect a candidate of choice for black voters, there has been added to that vote approximately twenty to thirty percent, in some cases, Hispanic; so that the voting strength of that group is going to produce an African-American Representative to the House, which if standing alone, there would be no voting rights problem.

But what it does is it fractures off the Hispanic population into that district as well, thereby depriving Hispanic voters of opportunities elsewhere to elect candidates of their choice.

Now, we have all heard the term and the Court [66] used it when it talked about this in the Congressional case, something called a super majority. And the super majority term that the Court employed in the Congressional case was one in which Hispanic VAP's needed to be over a certain percent, generally recognized as a rule of thumb somewhere in the 60's, somewhere 60 percent Hispanic VAP or above. And it took extra Hispanic population and placed them in Hispanic districts. So that in some districts under the plan drafted by the House of Representatives, you have Hispanic VAP districts of 83.64 for district 110, for example, or 76.56, district 111.

Now, the consequence of doing this was that there were opportunities not available to the State elsewhere to draw districts where Hispanic voters could elect a candidate of their choice without any contrasting arm to any of the black districts. There has not been—and this is a very important part of our case. There has not been any testimony that if the Hispanic population were removed from the African-American districts, that those districts would still not be a viable district for African-American voters. In fact, most of the testimony has demonstrated quite clearly that Hispanic voters and black voters often prefer different candidates of their choice.

So, the State plan draws nine districts in the [67] South Florida area. The alternative plans draw eleven. We all agree on that. There have been all kinds of measures of whether or not the districts drawn will give Hispanic and black voters an opportunity to elect candidates of their choice. Dr. Handley, who was on the witness stand yesterday, testified to two very important things. And I might add that in their own EDS reports they demonstrate this fact and it's in writing in their own reports and their testimony was consistent with it yesterday, the EDS study. These are the State's own experts, by the way.

What did it show? It showed that Hispanics are politically cohesive, that there is a racially polarized voting and that it also proved that under the definition used by the State's own people, there were more effective minority districts under the alternative plans than the State's plan. Now, what has been the criticism of the State to the alternative plans? The major criticism has been that they might teeter/totter and maybe they're not going to elect these alternative districts drawn by the plaintiffs. They might not elect with certainty, with safeties, a guarantee that a minority candidate would be elected.

Well, I submit to you that is not what the Voting Rights Act requires. The Voting Rights Act requires an equal opportunity to elect, not to be sure. The [68] popu-

lations placed in these districts under the alternative plans are almost certain to be, as Dr. Lichtman said, rock solid and will elect a candidate of choice because some of the districts have a high percentage of population and there is racially polarized voting. But all of the districts—this is the key point it seems to me: All of the districts drawn under the alternative plans using a definition that Dr. Handley extracted from Section 2 of the Voting Rights Act, when she characterized the district as competitive, the language she used was it will give an equal opportunity to elect.

So, the State has admitted for purposes of this case that there are more districts that meet the requirements of Section 2 of the Voting Rights Act under the alternative plans than under the State's plans. And that's really what this case comes down to.

So, we submit that taken together with the totality of circumstances and the proportions of districts and so on that has been presented, the history of discrimination, the socioeconomic disparity that minority people face and so on, that the districts drawn under the alternative plans demonstrate quite clearly that Hispanic voting strength has been minimized in the sense that it has not been given an opportunity to be fairly reflected.

And one last comment and that is about [69] citizenship. And I find it odd, indeed, that the State would take the position in this court that for purposes of redistricting, non-citizens need not be taken into account, because that's really what they're arguing here. They're saying look at the citizenship rates. And for those people who are non-citizens, you don't need to look at their position with regard to the Gingles test in redistricting, in measuring districts.

That not only cannot be the law in this country, but it is not even a practice followed by the House when they did redistricting themselves, because they counted everybody of voting age population, not only when they did

the redistricting but when they measured the district for political continuity.

We submit on this record that this Court is duty bound to find a violation of Section 2 of the Voting Rights Act with respect to the drawing of House districts for the Florida House of Representatives in South Florida. Thank you.

* * * *

[78] The plaintiffs have not shown dilution of the Hispanic vote in Dade County. That is their burden. They must. Mr. Brace and Mr. Meier testified that Dade County retains 18 House districts, but that the Hispanic population in Dade is 50 percent and that the House plan creates 9 majority Hispanic districts and one Hispanic seat, 46 percent VAP.

The Voting Rights Act does not require proportional representation, but our plan guarantees, in fact, that they will have proportionate representation at an absolute minimum. We did this without compromising the interest of the African-American community as evidenced by the support of the House Black Caucus and the Florida NAACP. Furthermore, the House districts in Dade County were drawn in such a way as to preserve the seats of all incumbent minority members.

The arguments for creating more than nine Hispanic seats and an influence seat are made through misconstruction of the Voting Rights Act and totally by ignoring the Voting Rights Act charge on proportionality. The plaintiffs have argued that Dade County really includes twenty districts and that they should therefore get ten or eleven seats. But they are including in their count [79] districts that are principally outside of Dade County. And that is the key.

If you include the entire population of those districts, then a Hispanic population does not remain at 50 percent. And remember that the Justice Department has conceded that there is no requirement of maximization, Turner versus Arkansas.

Additionally, Mr. Brace testified you can only get to ten or eleven in Dade by drawing districts that will wholly fail any test of compactness.

* * * *

[82] JUDGE HATCHETT: We're not to remedy yet.

MR. DUBBIN: I'm sorry.

JUDGE HATCHETT: Well, again—

(Pause)

JUDGE HATCHETT: We're prepared to make a ruling as to the House at this time. The Court finds that under the totality of the circumstances the plaintiffs have shown a violation of Section 2 in that the plaintiffs have shown that more than nine Hispanic districts may be drawn without having or creating a regressive effect upon black voters in South Florida and in Dade County.

[83] Consequently, the Court will continue into the remedy phase of this case. We're going to take a recess at this point to give the parties a chance to discuss our ruling and see whether, with that ruling in mind, they're able to suggest jointly a plan. If not, the Court will come back, will hear argument from the parties as to the type remedy to be imposed. That could include selecting one of the plans already in the record or it could include the drafting of a plan by the Court. And during your arguments you may urge the drafting of a plan or you may support any plan other, of course, than the plan that we now find is a violation of Section 2.

* * * *

[140] JUDGE HATCHETT: Mr. Hebert, during the conversation at some point during the last five days, you indicated that the Justice Department did not submit plans, [141] but if ordered to produce a plan the Attorney General may comply. Was that—did we understand you correctly? What was your statement regarding that?

MR. HEBERT: There have been occasions when a Court has been faced with a situation where it has either

plans that it has from competing parties and the United States has been involved and it has asked the Attorney General to draw a plan and submit that plan to the Court as a sample plan for the Court's consideration. It happens rarely. It hasn't happened in a long time, but there have been occasions when it has happened.

We—our computer system, unfortunately, is in Washington, D.C. And we—if we were there, we would probably be able to have a better fix on some of these.

I will offer whatever help I can be to the Court. If the Court were to direct that we get inolved in actually drawing the lines, I could actually start to do that down here with assessing the State's computers. Even my statisticians and demographers and so on aren't here. It's just the lawyers. And although my two lawyers have a great deal of expertise on the computers, I'm not sure that we really advance the ball very far.

JUDGE VINSON: How long would it take you to do that?

MR. HEBERT: What I would do—and I'll answer [142] your question this way and I'll try to give you a time. But what we would do, I think if I were trying to fix this, I would take the De Grandy or Hargrett, Reaves and Brown districts in the Dade County area and then what I would do is tell the State to fix the rest. So, in other words, you take the Hispanic districts as drawn by the De Grandy plan so that they don't have a concern about those districts and the black districts continue to be safe. I would take those. And then I would let the State fix the rest of the area to reduce as much as possible the ripple effect. And they have that capability.

JUDGE HATCHETT: All right. Thank you. You've answered our question.

MR. CROWLEY: Your Honor, I would respond by saying that is—

JUDGE HATCHETT: We don't want a response at this point.

(Pause)

MR. CROWLEY: Is it all right for me to comment very briefly?

JUDGE HATCHETT: You don't need to comment on that. We're on to something else by now.

MR. CROWLEY: Well, Your Honor, the last—

JUDGE HATCHETT: We would like to hear your comment on this proposition: That we would order the House [143] to accept the original De Grandy plan for Dade County and then the State fix the rest as was just suggested by Mr. Hebert. What are your comments regarding that?

MR. CROWLEY: I guess that I would say it's exactly backwards, quoting the U.S. Supreme Court in Wise versus Lipscomb: "If it is not practical to defer to the legislature or other state entity, then a district court should not intrude upon state policy any more than necessary; that is to say you start with the Joint Resolution and then you make the minimal effects, not import an entirely different plan and then try to integrate the state product on the edges."

Under the Supreme Court's law, you start where the problem is, as Mr. Meier said a few moments ago. He went directly to the two districts that were targeted in the plan. The fixes were made; the legislative policy expressed was maintained.

JUDGE VINSON: We fixed Dade County and we're asking you to fix the rest of it with as little ripple effect as possible, which is exactly what the Supreme Court says. Now, can you do it or not?

MR. CROWLEY: Yes, Your Honor, the fix—and I think Mr. Meier showed—that there was virtually no ripple effect while maintaining the same number of districts, whereas he is about to show you what the ripple [144] effect is with the so-called De Grandy thing.

But I think it's important that we understand what the U.S. Supreme Court is saying. It's saying you start with what the legislature has done and you make the minimal fix. You seek to maintain the state policy. And that is what this eleven plan does.

MR. HEBERT: One problem with the suggestion that the State is making here is that by taking the boundary lines of the State's plan in Dade County and only concentrating on two particular districts where the State claims the violation exists, I think unnecessarily limits the focus that is taking place.

And I should make it clear that when I said I believed the easiest fix here and the one that I think the State is in the best position to fix and so, therefore, you are in a sense deferring to their legislative judgment and whatever political considerations exist outside of the Dade County area is that you would ask that the De Grandy plan, Hispanic districts and African-American districts all be accepted as drawn and then let the State fix the rest, which has not yet been asked.

JUDGE VINSON: That's exactly what we asked them to do. We haven't gotten that response, but that's exactly what we asked them to do. Let's see what anybody else has to say.

[145] JUDGE HATCHETT: Anyone else?

MR. RUMBERGER: I agree we want to be quick and maybe have the Justice Department involved in it. We have been involved in this process for a long time. There is absolutely no reason for us to believe that anything other than something that might be devastating to us may occur, which is not to say that the Justice Department should draw it but we certainly should have it moderated and make sure that in fact the ripple effect as required is in fact met.

I would be very, very afraid of having them just fix the Dade County and then declare, for whatever reason, that Broward and the rest of them were all in fine shape. So, I think it's going to require tab, not necessarily co-, but a tab monitoring to get us through that one political hurdle.

MR. REAVES: Your Honor, if I may address the Court?

JUDGE HATCHETT: Yes.

MR. REAVES: My concern, sir, is that in doing so, in taking the De Grandy and Reaves/Brown plan and having the State/House operate and place it upon the Florida plan, that we do not see any retrogression in the Broward County area as far as African-American districts that we have already witnessed in the Escambia area.

[146] And the other concern that I have is that when we mesh the De Grandy Reaves/Brown plan into the Florida plan, which was presented to the Court, we found that in dealing with the ripples, you actually enhance the fifth access African-American district in Dade County up by I think it's 2.1 or 2.3 points. So that possibility exists. I know you are not looking for that possibility. We don't want retrogression in the Broward County area. And if justice is for the end, there may be possibilities to correct some Section 2 violations that we have not addressed here in this Court. But we do not want the spliting of black communities in Broward County to protect any incumbents or anything of that nature.

JUDGE HATCHETT: Thank you, sir.

MR. GELLER: Your Honor, my name is Representative Steve Geller. I was one of the people that moved to intervene earlier and was admitted instead for the sole purpose as acting as friend of the Court, amicus curiae.

Would it be permissible, since the attorneys—I am a member of the bar and I am a member of the federal bar—to very, very briefly address this because this is exactly the concern that we were worried about and I promise I can do it within two minutes.

JUDGE HATCHETT: Two minutes.

[147] MR. GELLER: Thank you, Your Honors. Particularly Justice or Judge Vinson—I'm sorry, Judge/Justice—the concern that we have and the reason why the people that tried to intervene earlier or instead decided to go amicus curiae would be vehemently opposed to this proposal because I don't think—I'm not sure if

Your Honors' understanding is that the changes are not solely within Dade County.

If we accept those proposals, it will take all of southwest Broward and put all of southwest Broward into seats which are dominated by Dade County. It's taking specifically that area that we had discussed, Century Village, and taking that out of southwest Broward, putting it into a seat in Dade County. It takes the Jewish Community Center in Davie and puts that into a seat that goes all the way down to Perrine.

This is exactly what we were arguing against. This is what we're hoping that Your Honors will not order. We are hoping that as the State had indicated they can do everything within the boundaries of Dade County, please let them do it within the boundaries of Dade County. Don't take away the entire southwest portion of Broward County, which is also an area, as we said earlier, which is a community of interest, where you do have a large number of Jewish constituents, that you are intentionally dividing [148] them. And that's the only reason that they're doing this, to create additional seats. You're putting people that don't belong in Dade County seats into those Dade County seats.

I am asking you please not to do that. If there is a way of doing their Dade County things within Dade County, which they have indicated they can, please don't take away southwest Broward from Broward County. Thank you very much.

JUDGE HATCHETT: Thank you.

Any other comments on this? Mr. Wallace.

MR. WALLACE: I understand, obviously, this is the Court's order. We're going to do our best to comply with that. I want to ask you for a little bit of flexibility. Representative De Grandy said that under his plan, that Monroe was the same and Collier was the same. That's not the case. And I think as I look at the map, think about the kind of rotations in populations we need to do, if we at least had the flexibility to restore Dade and

Monroe Counties—I'm sorry—Collier and Monroe Counties into the configuration they were in our plan, we would minimize the intrusion into Broward as well, of course, into Collier and Monroe, from the, you know, from the differences that are in the Joint Resolution from the De Grandy plan.

[149] I'm just asking. We'll do our best with the Court's order with respect to working around the minority districts, but Monroe and Collier don't have to be done the way that they were done in the De Grandy plan. And it will make the implementation and the minimization of the ripple effect much easier if we had the opportunity to work with those counties as they are in the Joint Resolution.

JUDGE HATCHETT: Thank you.

Mr. Russell, do you care to be heard?

MR. RUSSELL: Yes. Your Honor, I think it's fairly obvious that on both sides of this podium you have absolutely no objectivity. Therefore, it seems to me that the most reasonable approach to this is for this Court to identify someone who has the expertise to do this, let them be supervised by the Justice Department and you give them specific instruction, for instance, as you have already done, that you want eleven Hispanic districts. I assume you want four or four and a half black districts, as has been proposed and instruct them to look at Dade and Monroe, because you have to consider Monroe and to some extent Collier, probably, to do this and have them draw that.

And I would further suggest to you, Your Honor, that the way—the easiest way for you to do this might be to instruct the Senate staff under your specific direction [150] and under oath to you to carry out his function, supervised by Justice, with input from the House.

JUDGE HATCHETT: Thank you.

MR. GREGORY: One of the last things that we want to do, Your Honor, is to have another evidentiary hearing to resolve disputes. Whenever I leave here, whenever

that is, I want to go to Jacksonville and don't come back any time soon. On behalf of Reaves/Brown and Hargrett, those Representatives who are going to be here for whatever special session are going to be here, but frankly, Your Honor, we would much rather have, as you have already proposed, Judge Vinson, take the existing, whether you call them De Grandy or Reaves/Brown Hargrett is not of particular concern to us in terms of the title, in terms of the name. Take those existing districts; Justice itself can supervise to make certain that it's done right. My concern is if you give it to the leigslature to come up with something, if it is not all the way correct and it goes to Justice, Justice doesn's agree with it, you are looking at a new fangled, informal preclearance where they may come back and tell the House didn't like it, the House says this is the way it's going to be and you have another evidentiary hearing.

We submit, Your Honor, that—I know it's rarely done and I know that Mr. Hebert has a lot of other [151] things to do, but if we all go to something that we're going to take those existing districts and if Justice takes it from there and does it and fills in the gap, we can resolve the problem. If the Court is ordering Justice to go ahead and fill in the gap correctly, then you can avoid what the NAACP is saying or I won't acknowledge that I agree with it because I don't. But you can avoid the left hand and the right hand going back and forth because you have Justice involved and you know it's going to be done right because you know it exists in districts and you know they will minimize the injury and they will submit to you as a Court-ordered plan.

We can avoid evidentiary hearing because chances are, if they come up with it by themselves, we're not going to like it. If we come up with it by ourselves, they're not going to like it. So, just give it to Justice with directions from the Court but first take into account the existing districts as already agreed upon in Hargrett and De Grandy because we know it works regardless of the form.

We have had God knows how many reports and analysis and testimony. So, you have enough of a record there to avoid another evidentiary hearing on the basis of those districts by themselves.

JUDGE HATCHETT: Thank you.

MR. DE GRANDY: Your Honor, very briefly, let [152] me take issue with Mr. Russell's statement and agree also with Mr. Russell's statement. I take issue that there is not objectivity on both sides of the table. We were objective enough to identify a Section 2 violation, bring it before this Court and you were objective enough to find that that was a meritorious argument.

Let me agree with Mr. Russell that as to the surrounding areas of minority districts we have philosophical in principal disagreements as to how to fit that plan. I would, therefore, join in Mr. Russell's request in so far as the surrounding areas of the De Grandy minority districts are concerned.

Our suggestion to Your Honors would be that you accept the black and Hispanic De Grandy districts in toto, that you then either appoint an expert or direct the State with the Department of Justice supervision, preferably even have the Department of Justice draft the ripple effect only. Your Honors have already examined, taken testimony on those minority seats and found, I think, implicitly at least at this point that they are the right thing to do for the minority districts of the state of Florida. Rather than come back here and argue about those districts, the rest of the surrounding areas are just political decisions that need to be made fairly.

If they're done with supervision by the Justice [153] Department, if they are done by an independent expert and thereafter ratified by this Court, we are objective and we would be satisfied with that result. Our contention from day one was that there were Hispanic communities and black communities in Dade County that were suffering from dilution of their voting potential.

We have come to you. You have agreed with us. You have been objective with us. We agree that there needs

to be some resolution of the surrounding areas. And we agree to an objective solution of those surrounding areas, if there is no agreement by the parties, by someone Your Honors have faith and trust in to do that job and to do it with the minimal impact possible to the state of Florida plan.

We are very happy that the minority districts will be created and I think in order not to get into a Section 2 argument as to whether the new remedy is violative of the Voting Rights Act, the best result is to accept those in total and only fix the surrounding areas by way of independent expert. Thank you, Your Honors.

JUDGE HATCHETT: Thank you.

MR. CROWLEY: Your Honor, just to the last point: If in fact the Court so orders, we'll, of course, abide. But as to the surrounding area, I mean, that is directly the case that I quoted before: Who better to [154] understand legislative intent than the branch of the legislature that constructed it in the first place. This is the domain of the legislature and the legislature ought to be given the first opportunity to make the adjustment pursuant to the Court's order.

It is certainly inappropriate to have a third party undertaking it. The object is to minimize the impact of what the legislature has done and cure only the narrow violations.

MR. RUMBERGER: May I have the last word, Your Honor?

JUDGE HATCHETT: No, they're people ahead of you.

MR. RUMBERGER: Oh, I'm sorry. Next to the last word, Your Honor?

JUDGE HATCHETT: We won't go around again.

MR. REAVES: I apologize, Your Honor. If we, in this order, if the Court can in its order for the Senate or the House to implement the De Grandy Reaves/ Brown plan to the Florida plan, make a time certain as to completion of that project. I have lived in this Court.

I have witnessed the dilatory tactics on the House and Senate side in saying they can't produce plans and suddenly appearing with eleven seats and then it takes time to present maps and then marching in with graphs, more graphs. If we could [155] have a time certain with that order, it would be greatly appreciated.

MR. RUMBERGER: Your Honor, let me only say that the effort on the part of—we spoke to Mr. Crowley, particularly—have the legislature correct it does not mean have the legislative staff do it or the chairman of the committee do it or the lawyers do it. If he wants to talk about the legislature, let's get them back in session.

In the meantime, this Court has found a violation of Section 2. We have proposed remedies including De Grandy and we would respectfully request that the Court adopt the De Grandy plan and make as was suggested by the Justice Department or have someone do the ripple effects under the supervision of the Justice Department, because that's the only way we believe we'll get a square deal. Thank you.

MR. WAAS: Your Honor, if I may, I am obligated to point out to the Court on behalf of the Secretary of State that qualifying for certain offices requiring precinct lines to be drawn begins this coming Monday. And if we're talking about Dade County and yet other counties, it becomes a more exacerbated problem. I just need to point that out.

JUDGE HATCHETT: We are well aware of all of that and some other considerations, also. For example— [156] MR. RUMBERGER: Judge, I don't know if it's been pointed out but in order to run you have to resign tomorrow. You have to resign ten days before the election and tomorrow is the day.

JUDGE HATCHETT: Well, all of us know what the problems are. Number one, one of the worst things that could happen would be for our rulings here to be appealed and our rulings reversed after the election. That's the first thing.

The second thing is getting an expert takes time. We'll get into the position where someone will ask this Court to enjoin the coming election all because we're unable to agree on a plan that can be imposed and appealed to the highest court to be either ratified or rejected.

So, I think it's in every ones' interest to try and work this out rather than to go through some long procedure that's going to require either the enjoining of an election or perhaps an election after an election. And there is no reason for the state of Florida to get itself in that position.

Consequently, we're going to talk on a few more minutes here and see if we can't come to some decision that will allow us to impose a plan, I mean, in twenty-four hours. If we don't, I just want to warn everyone here that you are running a terrible risk regarding the next [157] election. Well, Judge Vinson says less than twelve hours, because I think we're at the point we're going forward where an election is being jeopardized.

Mr. Hebert.

MR. HEBERT: I just wanted Your Honors to be aware of one thing because everyone seems to allude to the Justice Department monitoring the ripple effect, perhaps. In essence, the Attorney General's role under Section 5 of the Voting Rights Act is precisely that. So, to the extent that there is a rippling effect and the State is permitted to do it, the Attorney General would be reviewing those lines because they would reflect the legislative decisions.

Now, I'm not suggesting for a moment that there needs to be any kind of delay, but the fact that there is that Justice Department monitoring that goes on to insure that there are no choices made outside of the area in the De Grandy plan that contain these minority districts. I just wanted the Court to be aware that there is that function anyway and there doesn't need to actually be someone from the Department of Justice literally looking

over the shoulder of the State, me or someone designated by me.

JUDGE HATCHETT: Is it your view that we would avoid the review by the Justice Department if you had a completely Court-ordered plan?

[158] MR. HEBERT: Yes.

JUDGE HATCHETT: Including Dade County and all other counties in Florida?

MR. HEBERT: That is correct.

JUDGE HATCHETT: You would have not have to review that?

MR. HEBERT: That is correct. The only ones that have to undergo preclearance are changes in the five covered counties that reflect the legislative policy choices of elected representatives. And if it does not, under McDaniel versus Sanchez, reflect such choices and are court imposed, then there is no Section 5 requirement.

JUDGE STAFFORD: If you had a—if you had the the parties agree, including the legislature, agree on it, would that be deemed to be a legislative plan? Or if the Court approves it, does that take it out of the legislative domain?

MR. HEBERT: It's—you're asking a very good question. If the legislature were to sign on to a consent agreement and present it to the Court, it still would reflect the legislative policy choices of the state even if it was agreed upon by the other side and was approved by the Court. The distinction is between a Court-imposed plan and one that is simply Court approved. Court approved does require preclearance; court imposed does not.

[159] MR. CROWLEY: Your Honor, Mr. Meier has Broward County. And I think that demonstrates the ripple, what ripple effect really is. We're just not talking about the margin. We're talking about an entire county being withdrawn. And that's what I come back to: The legislature has done its job there and no one has attacked that job in Broward County. It's not bene in any way diminished by this Court's action.

Again, we're going backwards. I would say to the Court the end point there is effect and the legislature will cure it. It will be done very quickly. Or we'll be back here within twelve hours. And I believe under the law, Your Honor, that that's the proper approach.

JUDGE HATCHETT: Okay. Thank you.

The Court will be in recess for fifteen minutes.

(Brief recess)

MR. CROWLEY: Your Honor, for point of information that may make it easier: We've conferred over on this side with Mr. Hebert during that short recess and are prepared, if the Court desires, to take up that suggestion and fix the ripple around the 292 plan. In talking to people that actually do the line drawing, they think that can be done in about twelve hours.

MR. RUMBERGER: We would like to know who is [160] going to supervise it.

JUDGE HATCHETT: Mr. Reaves.

MR. REAVES: Yes, Your Honor. And we would also like the Court to order that there will be no retrogression from the previous Florida plan as far as African-American communities in any of the surrounding counties of Dade County and a time certain.

JUDGE HATCHETT: We have done the best that we can with this case. It's important that the voters of Florida know where their districts are and go on with the elections.

The Court will adopt the modified De Grandy plan, the modified De Grandy plan.

The court is adjourned.

(Court adjourned at 9:45 P.M.)

* * * *

Supreme Court, U.S.
FILED
APR 21 1993
OFFICE OF THE CLERK

No. 92-519

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BOLLEY JOHNSON, Speaker of the Florida House of Representatives, PETER R. WALLACE, Chairman of the Reapportionment Committee of the Florida House of Representatives, LAWTON CHILES, Governor of the State of Florida, ROBERT A. BUTTERWORTH, Attorney General of the State of Florida, and JIM SMITH, Secretary of State of the State of Florida,

Appellants,

v.

MIGUEL DE GRANDY, MARIO DIAZ-BALART, ANDY IRELAND, CASIMER SMERICKI, VAN B. POOLE, TERRY KETCHEL, ROBERTO CASAS, RODOLFO GARCIA, JR., LUIS ROJAS, LINCOLN DIAZ-BALART, JAVIER SOUTO, JUSTO LUIS POZO, ALBERTO CARDENAS, REY VELAZQUEZ, LUIS MORSE, ALBERTO GUTMAN, KAREN E. BUTLER, SGT. AUGUSTA CARTER, JEAN VAN METER, ANNA M. PINELLAS, ROBERT WOODY, GINA HAHN, BILL PETERSEN, TERRY KESTER, MARGIE KINCAID and BROOKS WHITE and the UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Northern District of Florida

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QUESTIONS PRESENTED

1. Whether a state-enacted reapportionment plan violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because it does not maximize the electoral opportunities of a class of minority plaintiffs, notwithstanding that the plan provides the minority class with the opportunity to elect representatives in numbers at least equal to the class's proportion of the population?

2. When determining minority voting strength under the test of *Thornburg v. Gingles*, 478 U.S. 30 (1986), may a plaintiff's case rest on estimates of voting age population that include substantial numbers of noncitizens who are ineligible to vote, or must the plaintiff demonstrate voting strength on the basis of eligible voters, at least where the defendant has demonstrated that a substantial percentage of the plaintiff class are not citizens?

3. May a federal court impose a reapportionment plan as a remedy for a Voting Rights Act violation without affording the State any opportunity to devise an acceptable remedial plan, especially when the court-ordered plan unnecessarily trenches on fundamental state policy choices?

4. Do core principles of comity and federalism require a federal court to abstain from adjudicating Voting Rights Act claims when the plaintiffs seeking federal court relief have previously raised, and demanded and received adjudication of, identical claims in an ongoing state court proceeding?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-519

BOLLEY JOHNSON, *et al.*,
Appellants,

v.

MIGUEL DE GRANDY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

---

BRIEF OF APPELLANTS

Speaker Bolley Johnson,[1] Representative Peter Wallace, Governor Lawton Chiles, Attorney General Robert Butterworth and Secretary of State Jim Smith, in their official capacities, appeal the judgment of the three-judge United States District Court for the Northern District of Florida, which held that the 1992 reapportionment plan for the Florida Legislature violates Section 2 of the Voting Rights Act.

OPINIONS BELOW

The July 17, 1992 opinion of the three-judge United States District Court for the Northern District of Florida in Nos. 92-40015-WS, 92-40131-WS, and 92-40220-WS

---

[1] Bolley Johnson has replaced T.K. Wetherell as Speaker of the Florida House of Representatives. His name has been substituted pursuant to S. Ct. Rule 35.3. In addition to the parties listed in the caption, Gwen Margolis and Jack Gordon were parties to the proceeding below. *See* S. Ct. Rule 24.1(b).

("Op."), holding that Senate Joint Resolution 2-G violates Section 2 of the Voting Rights Act, has not yet been reported, and appears in the appendix to the jurisdictional statement ("J.S. App.") at 7a. The May 29, 1992 opinion of the three-judge court in Nos. 92-40015-WS and 92-40131-WS, reapportioning districts for the United States Congress, is reported at 794 F. Supp. 1076, and appears at J.S. App. 77a.

JURISDICTION

The judgment that Senate Joint Resolution 2-G violates the Voting Rights Act was entered on July 2, 1992. Appellants Wetherell and Wallace filed a notice of appeal to this Court on July 24, 1992. Appellants Chiles, Butterworth, and Smith filed a notice of appeal to this Court on July 29, 1992. The appeal was docketed within 60 days of July 24, 1992. Probable jurisdiction was noted on February 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

STATUTORY PROVISIONS INVOLVED

See J.S. App. 211a.

STATEMENT OF THE CASE

On April 10, 1992, the State of Florida enacted Senate Joint Resolution 2-G ("the State Plan"), which reapportioned the Florida Senate and House of Representatives on the basis of the 1990 census results. The State Plan creates 20 single-member House districts in the Dade County area. The plan affords Hispanics, who comprise approximately 45% of the population of that 20-district area, the opportunity to elect their preferred candidates in at least 9 of the 20 districts (or 45%).

Nevertheless, on July 2, 1992, a three-judge United States District Court issued an unprecedented ruling that the State Plan violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because it failed to *maximize* the number of Hispanic House districts in the Dade

County area.[2] This Court stayed the district court's judgment, and the State Plan was implemented for the 1992 elections. Hispanic candidates were elected in 9 of the 20 districts.[3]

Appellants seek reversal of the district court's ruling because it fundamentally misconceives Section 2 of the Voting Rights Act. Section 2 does not guarantee maximum electoral opportunity. Section 2 provides that a protected class should not be afforded "*less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(c) (emphasis added). Based on the district court's findings that the plan permits Hispanic voters to elect preferred candidates in 9 of the 20 districts, the State Plan plainly does not afford Hispanics in the Dade County area "less opportunity than other members of the electorate."

A. Reapportionment After the 1990 Census

1. The Reapportionment Process

Article III, § 16 of the Florida Constitution requires that Florida's bicameral legislature be reapportioned every ten years on the basis of the decennial census.[4] According

[2] The portion of the State Plan that reapportioned the Florida House of Representatives is at issue in this appeal, No. 92-519. The portion of the State Plan that reapportioned the Florida Senate is at issue in No. 92-593 and No. 92-767. The district court held that the Senate part of the plan violated Section 2 because it failed to maximize the number of both Hispanic and African American Senate districts in Dade County, but that no remedy was appropriate because maximizing one group's representation would inevitably impair the represention of the other group.

[3] *See Elections 1992; State of Florida Official Primary Election Returns; Sept. 1, 1992, Sept. 8, 1992, Oct. 1, 1992*, Fla. Dept. of State, Div. of Elections; *Elections 1992; State of Florida Official General Election Returns; Nov. 3, 1992*, Fla. Dept. of State, Div. of Elections.

[4] Section 16 provides for a maximum of 40 state senate districts and 120 state house districts, and permits either a single-member

to the 1990 census, Florida's population grew in the 1980's by 3,213,602, to 12,937,926 (or 33%). Op., J.S. App. 9a. This explosive growth reshaped the ethnic and political makeup and geographic distribution of Florida's population. The population growth of Hispanics, including substantial immigration of Hispanics from Cuba and Central and South America, accounts for approximately 700,000 of the 3.2 million increase. Reapportionment thus required a substantial reconfiguration of the State's legislative districts.

Following the 1990 census, the Florida legislature established bipartisan House and Senate committees to propose a plan for reapportionment. The committees took steps to open the process to all interests and perspectives. Members of the Florida Caucus of Black State Legislators served on the committees and played an active role throughout the redistricting process.[5] Members of the Hispanic Caucus, including Representatives Miguel De Grandy and Mario Diaz-Balart, the principal private plaintiffs in this case, also served on the committees and played

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or a multi-member district configuration. *See* Florida Const. Art. III, § 16(a). Prior to 1972, Florida used a county-based plan of apportionment that combined multi-member districts and single-member districts. *See In re Apportionment Law SJR 1305*, 263 So. 2d 797, 801 (Fla. 1972). Though permitted by Art. III, Section 16, that approach was abandoned in 1982 and replaced with a single-member district plan for all districts within the State. Florida chose single-member districts to reduce the risk that the voting strength of its minority populations would be unfairly reduced as a result of the tendency of multimember districts to submerge minority voting strength. *See generally In re Apportionment Law SJR 1E*, 414 So. 2d 1040, 1042-1045 (Fla. 1982).

[5] Testimony of Representative Willie Logan (caucus chairman), VII Trial Transcript ("Tr.") 73-77. The role of the Black Caucus, and of Florida's African-American organizations, including the NAACP, is described more fully in the brief *amicus curiae* of Florida State Representatives Cynthia Chestnut, Douglas Jamerson, Alfred Lawson, Willie Logan and Alzo Reddick, submitted in this case at the jurisdictional stage. Appellants respectfully refer the Court to that brief for a fuller description of the process.

an active role.[6] Representatives De Grandy and Diaz-Balart introduced proposed reapportionment legislation in the Florida House.[7] Indeed, more than 150 groups, including the Florida Chapter of the NAACP,[8] participated in the process.[9] Thirty-four public hearings were held throughout the State, from Pensacola to Key West, to permit citizens and groups to contribute their views. The State Plan was the product of this process.

2. The Reapportionment of Dade County

The Dade County area comprises substantial Hispanic, African-American and Anglo (non-Hispanic White) populations in a densely populated urban environment. Hispanics make up approximately 45% of the voting age population of the 20-district Dade County area.[10] As

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[6] Testimony of Representative Miguel De Grandy, IV Tr. 21, 42-45, 50.

[7] *See* Logan Testimony, VII Tr. 79; De Grandy Testimony, IV Tr. 20-42.

[8] Testimony of Leon Russell (Vice President State Conference of the NAACP), III Tr. 107-08, J.A. 425-26, and VII Tr. 139 (expressing NAACP support for Dade County House redistricting in the State Plan, and noting NAACP participation in its drafting and implementation).

[9] *See* Def. Cong. Exh. 4, Joint Appendix ("J.A.") 227 (listing groups, including the Cuban American Bar Association, the Coalition of Hispanic American Women, the Spanish American League Against Discrimination, the Nicaraguan American Bankers and Businessman's Association, the Hispanic American Builders Association, the Concerned Puerto Rican Alliance, the Latin American Chamber of Commerce, and the Nicaraguan Medical Association).

[10] The population of Dade County proper is 1,937,094. The ideal House district is 107,816. Thus, 17.94 districts can be contained within Dade County. Technically, 17 districts in the State Plan are wholly within the County. Eighty-one percent of the residents of an eighteenth district reside in Dade County. *See* Testimony of George Meier, VI Tr. 203, 210. For the 18 districts, the voting age popula-

the district court found, the State Plan affords Hispanics the opportunity to elect their preferred candidates in at least 9 of the 20 House districts (or 45%). *See* Op., J.S. App. 67a. African-Americans, who make up slightly less than 20% of this 20-district area, will be able to elect preferred candidates in at least 4 of the districts (or 20%). *Id.*, J.S. App. 67a. The remaining 7 districts contain Anglo voting age majorities, but one includes a substantial African-American population and is currently represented in the House by an African-American.[11] Another contains a Hispanic voting age population of at least 46%,[12] and its incumbent, a bilingual Anglo Dem-

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tion and numbers of majority House districts for each group is as follows:

Population		Number of House Districts
Hispanic	50.4%	9 (50%)
African-American	16.0%	4 (22%)
Anglo	32.1%	5 (28%)

See Plaintiff's Exh. 5 (Report Accompanying SJR 2-G) (Data for Districts 102-119), J.S. App. 171a, 180a-182a.

However, in this litigation, the plaintiffs contended that the relevant frame of reference for evaluating alleged Hispanic vote dilution was a somewhat larger 20-district "Dade County area." *See* Complaint of the United States at ¶ 4, J.A. 75, and the district court analyzed the allegations within this frame of reference. Only 2 percent of the residents of one of the additional districts, and only 28 percent of the residents of the second additional district, reside in Dade County. For the 20 district area, the voting age population and number of majority House districts for each group is as follows:

Population		Number of House Districts
Hispanic	46.6%	9 (45%)
African-American	15.6%	4 (20%)
Anglo	36.4%	7 (35%)

See Plaintiffs' Exh. 5 (Data for Districts 101-120), J.S. App. 171a, 180a-182a. Thus, the issues on appeal are not materially affected by which frame of reference is chosen.

[11] Wallace Testimony, VII Tr. 164; Logan Testimony, III Tr. 164, J.A. 386.

[12] De Grandy Testimony, IV Tr. 51.

ocrat, receives substantial Hispanic support.[13] If the Hispanic population increases, this district could well become a Hispanic majority district.

At bottom, the State Plan creates the opportunity for Hispanics and African-Americans in the Dade County area to achieve levels of electoral success commensurate with their population percentages. The State Plan does not seek to *maximize* the electoral prospects of any particular population in Dade County; maximization of one group's opportunity would necessarily require diminution of another's. Rather, to the extent Dade County's Hispanic, African-American and Anglo communities have distinct and incompatible political interests, the State Plan affords each community an equal opportunity to elect candidates of choice.

That the legislature was able to achieve this result is little short of remarkable. The drafters of the State Plan had to reconfigure the political landscape of the Dade County area in response to what one of plaintiffs' experts described as "the single most dramatic ethnic transformation of any major American city in this century."[14] Dade County's overall population grew by 19 percent during the 1980's, but its Hispanic population increased by more than 350,000 persons (or 64%), principally as a result of immigration from Cuba, Nicaragua, Columbia, Peru and other Latin American nations. These immigrants chose Dade County, according to plaintiffs' expert, because "Latin Americans felt they could come here without suffering the kind of language barriers and discrimination that they would suffer in other large U.S. cities."[15] Whereas in 1980, Anglos made up 47% of Dade County residents and Hispanics 36%, by 1990 those percentages had essentially reversed. His-

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[13] Ex. 47 (EDS, Inc. Report on Racial Bloc Voting) at 8, J.A. 34; De Grandy Testimony, IV Tr. 52.

[14] Affidavit of Dario Moreno at ¶ 6 (June 23, 1992), J.A. 170.

[15] Testimony of Dario Moreno, II Tr. 14, J.S. App. 185a.

panics now constitute the majority of the voting age population of Dade County proper, and a plurality of the 20-district Dade County area.[16]

The reapportionment plan also had to account for the exceedingly complex structure of Dade County politics. Dade County's dominant Cuban-American population (which constitutes a substantial majority of the Dade County Hispanic population),[17] is extremely conservative—"in stark contrast to that of other Latinos across the U.S.," as plaintiffs' expert put it.[18] Dade County's other principal populations, Anglos and African-Americans, are substantially more liberal, and heavily favor Democratic candidates.[19] At times, Democratic Anglos and African-Americans forge alliances to defeat Republican Hispanic candidates, and elect both Anglo and African-American Democratic candidates. In other instances, Republican Anglos and Cuban-Americans unite to defeat Anglo or African-American Democratic candidates. Cuban-Americans and African-Americans have not, however, forged political alliances in Dade County to defeat Anglo candidates. All experts in this case agreed that the political and ethnic antipathies between Cuban-Americans and African-Americans in Dade County are extreme.[20] Other Hispanic subgroups in the Dade County area have, however, allied themselves with African Americans.[21] Thus, the way in which these ethnic

[16] Meier Testimony, VI Tr. 226-27. The population shift since 1960 is even more stunning. According to the 1960 census, Anglos constituted 79.6% and Hispanics 5.5% of the Dade County population

[17] Op., J.S. App. 44a.

[18] Moreno Affidavit at ¶ 26, J.A. 182.

[19] According to plaintiffs' expert, "Dade County's white voters are among the most liberal in Florida." Moreno Affidavit at ¶ 32, J.A. 185.

[20] *E.g.*, Affidavit of Allan J. Lichtman at ¶¶ 6-8 (June 27, 1992), J.A. 202-203. The district court so found. Op., J.S. App. 45a-53a.

[21] *See* Logan Testimony, III Tr. 147 (Mexican-Americans vote to support African-American candidates in Dade County), J.A. 383.

populations and subpopulations are combined within single-member districts dramatically affects who will be able to elect representatives of choice in particular districts.

B. Legal Challenges to the State Plan

Litigation over the reapportionment of Florida commenced in January 1992, months before the legislature had even adopted the State Plan. On January 14th—the opening day of the 1992 legislative session in which Art. III, § 16(a) of the Florida Constitution required reapportionment to be considered—Representative Miguel De Grandy and several other Cuban-American officeholders and state Republican leaders filed an action in federal court in the Northern District of Florida.[22] They alleged that Florida's *pre-existing* 1982 apportionment plan violated constitutional one-person one-vote requirements, and demanded an immediate federal court order redistricting the State. The district court refused to act on the complaint because the Florida legislature had not yet had the opportunity to enact a new reapportionment plan.

1. Proceedings in the Florida Supreme Court

After the legislature enacted the State Plan on April 10, 1992, the State submitted the plan to the Florida Supreme Court for review, as required by Art. III, § 16 of the Florida Constitution. Voting Rights Act challenges to the State Plan were *first* raised in these Florida Supreme Court proceedings. Representative De Grandy and the other private plaintiffs in the instant federal case ("the De Grandy plaintiffs") participated in that proceeding. They contended that, under Art. III, § 16, the Florida Supreme Court "cannot fulfill its duty . . . unless it first finds that the plan meets the standards of the Voting Rights Act," and that the court "must, in actuality, con-

[22] *See* Motion to Dismiss First Amended Complaint at 13 nn.8 & 9, R. 32.

duct . . . a Section 2 . . . analysis."[23] The De Grandy plaintiffs made substantial evidentiary submissions to support their claim that the State Plan violated Section 2.[24]

In its May 13, 1992 opinion, the Florida Supreme Court asserted jurisdiction over the Section 2 claims. The court found that the State Plan "does not discriminate against minorities," and "is a material improvement over conditions under the 1982 plan"—which had resulted in 7 Hispanic-controlled districts in the Dade County area. *In re Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 285 (Fla. 1992), J.S. App. 104a. The court then held that the State Plan "is not significantly less favorable to minorities than other proposed plans, and provides *a substantial opportunity for minorities to influence elections and elect representatives of their choice.*" *Id.* (emphasis added)

The Florida Supreme Court issued this ruling without prejudice to further consideration. In its May 13th order, the court specifically invited interested parties to submit additional evidence to support their Voting Rights Act challenges, and provided for "expedited disposition" after a full evidentiary hearing. *Id.* at 285-86, J.S. App. 120a. No party availed itself of this opportunity.[25]

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[23] *See* Brief of Miguel De Grandy, Et Al. In Opposition To Constitutionality of Joint Resolution 2G (filed April 24, 1992 in Fla. S. Ct. No. 79,674) at 9, J.S. App. 168a; *id.* at 15, J.S. App. 169a-170a.

[24] *See In re Senate Joint Resolution 2G, Special Reapportionment Session 1992*, 597 So. 2d 276, 284 (Fla. 1992) (discussing evidentiary submissions), J.S. App. 117a-119a.

[25] Because in the 1960s bilingual ballots were not available in five Florida Counties containing Hispanic populations, these five counties —not including Dade, which had bilingual ballots—are subject to the preclearance requirements of Section 5 of the Voting Rights Act. *See* Op., J.S. App. 13a-14a. Accordingly, the State Plan was submitted to the U.S. Department of Justice for preclearance on April 17, 1992. On June 16, 1992, the Department precleared the State Plan's reapportionment of the House of Representatives. Thus, for Section 5 purposes, the Department found no Hispanic vote dilution in the five covered counties. The Department objected to the drawing of one district in the State Plan's reapportionment of the Senate. That district was in the Tampa area, and is not at issue in this appeal. Both the Florida Supreme Court and the court below issued orders implementing an identical "remedy" for the Section 5 Senate deficiency identified by the Department.

2. Initial Section 2 Proceedings in Federal Court

Instead, the De Grandy plaintiffs sought to change forums and to litigate identical Section 2 claims against the State Plan in federal court. They did so by seeking to amend the complaint they had previously filed in federal court which had raised challenges only to Florida's *1982* legislative districts. Defendants moved to dismiss all Section 2 claims on the grounds of abstention, comity and *res judicata*, in light of the Florida Supreme Court's May 13th ruling. J.S. App. 210a.

On June 22, 1992, the federal district court granted the De Grandy plaintiffs leave to amend, and denied defendants' motion to dismiss. *See* Order, R.460. The next day, the United States filed a complaint alleging violations of Section 2 similar to those the De Grandy plaintiffs had previously raised.[26] The United States moved for a preliminary injunction on June 25, 1992.

The next morning, June 26th, the district court denied the preliminary injunction motion, consolidated the United States' challenge with the private challenge, and ordered trial to commence immediately that same day on all pending complaints. Defendants were afforded no opportunity to answer the United States' complaint, to take discovery to ascertain the factual basis for plaintiffs' allegations, to depose plaintiffs' experts on their theories as to why

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[26] The United States had been aware of litigation challenging the State Plan for several months. Indeed, defendants filed a third-party complaint against the United States in this action, and the United States moved to dismiss that claim on May 10, 1992. Op., J.S. App. 13a. Furthermore, the State Plan had been submitted to the Justice Department for preclearance on April 17, 1992. Op., J.S. App. 12a.

vote dilution existed in Dade County, to seek summary judgment, or to prepare a complete trial defense.

3. The Federal Court Trial

a. *The liability phase.* The De Grandy plaintiffs' June 18th third amended complaint alleged Voting Rights Act violations in several Florida counties against both the Senate and House portions of the State Plan. The United States similarly alleged violations "in Dade County and elsewhere." [27] Both complaints alleged Hispanic vote dilution in Dade County. With respect to the Florida House, the United States alleged Hispanic vote dilution within a 20-district Dade County area, claiming that Florida should have created two more Hispanic districts in that area than were created by the State Plan. The De Grandy plaintiffs similarly alleged that the Dade County Hispanic population was fragmented to prevent the creation of 2 additional Hispanic districts. *See* De Grandy Third Amended Complaint, County VIII, ¶ 142, J.A. 71. Both the United States and the De Grandy plaintiffs also alleged African American vote dilution in Escambia County (Pensacola), which is several hundred miles northwest of Dade County.

In opening statements at trial, the United States explicitly represented that its case would be "limited to the specific areas . . . just mentioned, [] Dade and Escambia Count[ies]." I Tr. 52.[28] The De Grandy plaintiffs initially alleged vote dilution in other areas of the State including Alachua County, I Tr. 65, Pinellas and Manatee Counties, I Tr. 103, Polk and Hillsborough Counties, and Volusia County, I Tr. 104. However, the trial evidence submitted by all plaintiffs focused exclusively on

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[27] Complaint of the United States at ¶ 8, J.A. 75.

[28] Counsel repeated this representation at several points in opening statement. I Tr. 52 ("Dade-Senate, Dade-House, Escambia-House only"); I Tr. 53 ("what we are really claiming here . . . is that the State of Florida minimized minority voting strength in the Dade County area"). The claim respecting Escambia County involved alleged African-American vote dilution. That issue is no longer a part of this case.

Dade County.[29] Hence, several days into trial, plaintiffs moved to dismiss all claims of Hispanic vote dilution outside Dade County, and the motion was granted.[30]

With respect to the Dade County area, plaintiffs attempted to show that voting was racially polarized, that Dade County Hispanic voters were politically cohesive, and that 11 Hispanic House districts (instead of the State Plan's 9) could have been created. Plaintiffs argued that the legislature's failure to enact alternative plans proposed by plaintiff De Grandy and plaintiff Reaves, which would have created the additional Hispanic districts, violated Section 2. These alternative plans, according to the testimony of plaintiff Reaves, were designed "to *maximize* the majority-minority districts possible" in Dade County.[31]

The State of Florida raised three principal defenses. *First,* defendants argued that the State Plan provided equal electoral opportunity and thus could not violate Section 2. Defendants supported this argument with undisputed facts showing that Hispanics in the Dade County area would have the opportunity to elect representatives

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[29] Plaintiffs' expert, Dr. Allan Lichtman, testified that he had been asked to examine issues of racial bloc voting and political cohesion "for Dade County." Lichtman Affidavit at ¶ 2, J.A. 201; Testimony of Allan Lichtman, III Tr. 12, J.A. 357. Another of plaintiffs' experts, Dr. Dario Moreno, gave testimony about racially polarized voting in Dade County. Moreno Affidavit, J.A. 170.

[30] III Tr. 8 (motion of counsel); III Tr. 214 (oral ruling granting motion). *See also* Op. at n.13, J.S. App. 21a.

[31] Testimony of Daryl Reaves, II Tr. 179 (emphasis added); *see also id.*, II Tr. 184 ("you must create the maximum number of Hispanic districts in Dade County"); IV Tr. 104.

Plaintiffs introduced two alternative plans during the liability phase of the proceedings. One was sponsored by plaintiff De Grandy, a Cuban-American Member of the House. Another was sponsored by plaintiff Reaves, an African-American member of the House. With respect to Dade County, "the Reaves-Brown plan and the De Grandy plan are virtually identical". De Grandy Testimony, IV Tr. 29.

in numbers proportionate to their population levels. *Second*, the State argued that Section 2 does not require maximization of minority districts. *Third*, the State argued that plaintiffs failed to prove the first *Gingles* precondition—that additional districts could be drawn in which Hispanics would constitute a majority of eligible voters—because plaintiffs' proof failed to account for non-citizens who are ineligible to vote. Defendants' unrebutted expert testimony showed that approximately 55% of the Dade County Hispanic voting age population were not citizens, and that 8 of the 11 Hispanic districts in plaintiffs' alternative plans would not contain Hispanic voting age majorities once this citizenship factor was taken into account.[32]

On the evening of July 1, 1992—only 5 days after the trial had commenced—the court heard closing arguments, and then immediately ruled from the bench. With respect to the Senate, the court ruled that no Section 2 violation had been proven because the number of Hispanic districts could not be increased without having a "retrogressive effect" on the African-American population. J.S. App. 202a-203a. With respect to the House, the court ruled that:

> under the totality of the circumstances the plaintiffs have shown a violation of Section 2 *in that the plaintiffs have shown that more than nine Hispanic districts may be drawn* without having or creating a regressive effect upon black voters in South Florida and in Dade County.

VIII Tr. 82 (emphasis added), J.S. App. 203a.

b. *The remedial proceedings.* The remedial proceedings commenced at approximately 7 p.m. on July 1st—

[32] Testimony of William DeGrove (expert demographer), VII Tr. 23-24, J.S. App. 187a; Defendants' Joint Exhibit 2, J.S. App. 206a. *See also* Op. at 33-34, J.S. App. 38a. During trial, the district court repeatedly ruled "as a matter of law that the relevant inquiry in this case is voting age population." V Tr. 40, J.A. 453; *see also* V Tr. 44 (same), J.A. 454; V Tr. 47 (court's ruling "means that citizenship is not important"), J.A. 455.

one hour after the liability judgment was entered. As the proceeding began, the De Grandy plaintiffs introduced a new proposed remedial plan "just hot off the press here about thirty minutes ago." VIII Tr. 96-97 (statement of plaintiffs' counsel). That plan—which the court referred to as the "modified De Grandy plan"—had never been produced to defendants or the court. The United States had not previously seen, and did not endorse, the plan. VIII Tr. 96. Although the district court had found fragmentation of Hispanic populations in only two districts in Dade County, the modified De Grandy plan radically reshaped the boundaries of *thirty-one* districts in the southern part of the State.[33]

The district court heard brief argument on the relative merits of the remedial plans before it, but refused to permit evidentiary submissions.[34] Plaintiff De Grandy—a previously sworn witness—argued from the podium that the modified De Grandy plan protected Hispanic voting opportunity better than did other remedial options, without substantial impairment of the state policies advanced in the State Plan. Those factual assertions were unsworn and not subject to cross-examination.

Less than three hours after the remedial hearing began, the court abruptly halted the proceedings and ordered implementation of the modified De Grandy plan. The court refused pleas from defendants, the NAACP, and *amici* representing Jewish voters to adjourn the proceeding to permit scrutiny of the modified De Grandy plan and consideration of other remedial options.[35]

[33] Maps of the State Plan and the Modified De Grandy plan have been lodged with the Clerk.

[34] VIII Tr. 98 ("We do not intend to hear any more evidence regarding plans"). Appellants objected to the remedial proceedings because they failed to provide any meaningful opportunity for adjudication of the extent to which the modified De Grandy plan unnecessarily infringed upon state policies. J.S. App. 203a.

[35] VIII Tr. 104. The House defendants subsequently filed a motion for reconsideration that proffered some of the evidence they

On July 2, 1992, the court entered separate judgments with respect to the Senate and House portions of the State Plan. In the Senate judgment, the court ordered the implementation of the Senate portion of the State Plan. J.S. App. 3a. In the House judgment, the court held that the State Plan violated Section 2 by diluting Hispanic voting strength, and ordered implementation of the modified De Grandy plan as a permanent remedy for all House elections through the year 2000. J.S. App. 1a.

C. Stay Proceedings in this Court

On July 10, 1992, Appellants applied to Justice Kennedy for a stay of the district court's July 2, 1992 order. Justice Kennedy referred the application to the full Court. On July 16, 1992, a unanimous Court granted the stay. *See* Stay Order in No. A-32, J.S. App. 139a. Notwithstanding this Court's stay order, on the evening of July 16, 1992, the district court issued an order requiring that candidate qualification for the 1992 Florida legislative elections be carried out in accordance with the modified De Grandy plan. On the morning of July 17, 1992, Appellants applied to Justice Kennedy for a stay of the district court's July 16, 1992 order. That application was referred to the full court, and was unanimously granted on the evening of July 17, 1992. *See* Stay Order in No. A-51, J.S. App. 140a.

D. The Three-Judge District Court's Opinion

On July 17, 1992, the three-judge court issued an opinion that "memorializes and explains the court's rationale for its July 2, 1992 rulings." J.S. App. 24a. Purporting to rely on *Thornburg v. Gingles*, 478 U.S. 30

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would have presented, had they been given the opportunity, demonstrating partisan bias, unnecessary district reconfiguration and other flaws in the remedy adopted by the court. *See* Motion for Reconsideration and Affidavits of George Meier and Kimball Brace attached thereto (July 2, 1992), J.S. App. 145a. The motion was denied.

(1986), the court held that the House portions of the State Plan violated Section 2. The court did not address defendants' argument that the State Plan provided Dade County Hispanic voters electoral opportunity at least equal to the opportunity afforded other members of the Dade County electorate. Indeed, the court appeared to find it irrelevant that the State Plan had no discriminatory effect on Dade County Hispanics. As Judge Vinson's concurring opinion explained:

> the plaintiffs have established in the De Grandy plan that eleven districts can be established in which Hispanics constitute over 64% of the voting age population and which are geographically compact. Further, these districts can be drawn without any dilution of African-American voting strength. Therefore, plaintiffs have established *all requisites* of their Section 2 claims.

J.S. App. 74a (emphasis added).[36]

The court's July 17th opinion appeared to contradict the court's July 2d judgment that the Senate portion of the State Plan did not violate Section 2. The opinion asserted that the Senate reapportionment had in fact violated Section 2. The court "explained" that the failure to create an additional Hispanic district violated Section 2 under *Gingles*. The court also held that the failure to create an additional African American Senate district violated Section 2. The court went on to conclude, however, that creating the additional Hispanic district would adversely

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[36] Notwithstanding the court's repeated rulings at trial that evidence of citizenship was irrelevant, the court's subsequent opinion addressed the "citizenship" issue. The court held that, because all 11 Hispanic districts in plaintiffs' proposed alternative plan "satisf[y] the 65% rule, the court need not inquire further as to the Hispanic citizenship levels in each proposed district." Op. at 37, J.S. App. 40a. The "65% rule" relied on by the court is a rule of thumb used by courts in Section 2 *remedial proceedings* to determine whether a proposed minority district will be effective. The rule is premised on a need to compensate for a variety of factors that have historically resulted in depressed minority electoral turnout.

affect African-American voting strength, and that creating the additional African-American district would adversely affect Hispanic voting strength. Faced with this conflict, the court concluded, the proper remedy for the Section 2 violation was to leave the State Plan for the Senate in place because it was the fairest allocation of political opportunity. J.S. App. 74a.

The court then "explained" its remedial order for the House. The court chose the modified De Grandy plan on the ground that it provided more assurance that the 11 Hispanic districts would be effective than did an alternative remedial plan offered by the House defendants. The court based this conclusion principally on what it described as the "testimony" of plaintiff De Grandy during the remedial proceedings. J.S. App. 71a.

Appellants challenge both the liability and the remedial holdings with respect to the House portions of the State plan.

SUMMARY OF ARGUMENT

The critical issue in this case is whether, as a result of its population size and geographic concentration, an ethnic minority can claim an entitlement under Section 2 of the Voting Rights Act to elect legislative representatives in numbers *greater* than the minority group's percentage of the population. The text of Section 2, and this Court's opinions in *Voinovich v. Quilter* and *Thornburg v. Gingles*, foreclose any such claim. Section 2 provides that a minority group will not have "less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice." 42 U.S.C. § 1973. As a unanimous Court recently made clear in *Voinovich*, Section 2 *"simply does not speak to the matter"* unless a plaintiff can prove that a "reapportionment scheme has the effect of denying a protected class the *equal* opportunity to elect . . . candidate[s] of choice." *Voinovich v. Quilter*, 113 S. Ct. 1149, 1156 (1993) (emphasis added).

Under this standard, the district court's finding of a Section 2 violation must be reversed. The district court's own findings show that Hispanics in the Dade County area constitute approximately 45% of the voting age population, and have the opportunity to elect their preferred candidates in 45% (9 of 20) of the area's House Districts. This reapportionment plainly does not result in Hispanics in the Dade County area having "less than equal opportunity to participate in the electoral process and elect representatives of their choice." Thus, the fact that the State Plan does not create 11 Hispanic districts in this 20-district area provides no basis for a finding of Section 2 liability. (Points I.A. and I.B.).

Nor can the district court's finding of a Section 2 violation be sustained on the basis of the alternative theory now advanced by the United States: that 11 Hispanic-controlled districts should have been drawn in Dade County to ensure that Hispanics who live in other parts of the State where Hispanic-controlled districts cannot be created will be afforded "representation" in the Florida House of Representatives. At trial, plaintiffs neither alleged nor proved a single one of the *Gingles* preconditions on a statewide basis, and the district court did not make findings sufficient to support liability under this theory. The theory is, in any event, insupportable on the facts and the law. (Point I.C.).

The district court's liability determination should also be reversed because the court's finding that plaintiffs had proven the existence of 11 districts in which Hispanics could constitute a majority of the eligible voters was clearly erroneous under the standards set forth in *Thornburg v. Gingles*. Defendants' unrebutted evidence showed that approximately 55% of the County's Hispanics are not citizens, and plaintiffs conceded that Hispanic non-citizenship levels are approximately 50%. Defendants demonstrated that once citizenship is taken into account, Hispanic voters would not constitute a majority in many of the plaintiffs' proposed districts. Plaintiffs, who bore

the burden of proving vote dilution with "district specific" evidence, *Gingles,* 478 U.S. at 60, n.28, never accounted for the citizenship factor in their case at trial. Moreover, neither evidence that additional influence districts could have been created nor reliance on the "65% rule" were sufficient to satisfy the *Gingles* geographic compactness requirement. Accordingly, the trial court's finding that 11 Hispanic-majority districts could have been created was clearly erroneous. (Point II).

The district court also erred in even considering the Section 2 claims of the De Grandy plaintiffs. Those plaintiffs had previously raised, and received an adjudication of, identical Section 2 claims in the Florida Supreme Court. Principles of *res judicata,* full faith and credit, and comity dictate that the federal court should have refused to permit the De Grandy plaintiffs to relitigate those claims in federal court. The United States' claims should likewise have been dismissed because those claims required the federal district court to, in effect, engage in appellate review of a determination of the Florida Supreme Court. *See District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 482 (1983). (Point III).[37]

[37] Even if liability is affirmed, the district court's remedial order must be vacated, as the United States concedes. (Point IV).

ARGUMENT

I. THE DISTRICT COURT MUST BE REVERSED BECAUSE FLORIDA'S HOUSE REAPPORTIONMENT PLAN AFFORDS HISPANICS IN THE DADE COUNTY AREA THE OPPORTUNITY TO ELECT REPRESENTATIVES IN NUMBERS AT LEAST PROPORTIONAL TO THEIR PERCENTAGE OF THE AREA'S POPULATION

A. A Single-Member District Reapportionment Plan Does Not Violate Section 2 of the Voting Rights Act Unless Plaintiffs Prove That the Plan Does Not Afford a Protected Minority Group Equal Electoral Opportunity

"The task of resolving" the meaning of Section 2 of the Voting Rights Act "begins where all such inquiries must begin: with the language of the statute itself." *See United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241 (1989). The text makes clear that a reapportionment does not violate Section 2 unless "it is shown" that

> the political processes leading to nomination or election in the State . . . are not *equally open* to participation by a class of citizens protected by [the Act] in that its members have *less opportunity than other members of the electorate* to participate in the electoral process and elect representatives of their choice.

42 U.S.C. § 1973(b) (emphasis added).

Section 2 says nothing about maximizing the number of legislative districts in which a minority class can elect preferred candidates. Rather, the statutory text makes clear that plaintiffs alleging vote dilution cannot prevail unless they prove that their opportunity to elect preferred candidates is substantially disproportionate to their levels in the relevant population. That much is also clear from additional language in Section 2 providing that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). This disclaimer plainly "implies that [minorities] who have influence proportional to their numbers do not state a [vote

dilution] claim". *See Baird v. City of Indianapolis*, 976 F.2d 357, 360 (7th Cir. 1992) (Easterbrook, J.); *Nash v. Blunt*, 797 F. Supp. 1488, 1496 (W.D. Mo. 1992) (three-judge court), *aff'd sub nom., African-American Voting Rights Legal Defense Fund, Inc. v. Blunt*, 61 U.S.L.W. 3682 (April 5, 1993).[38]

This Court's recent decision in *Voinovich v. Quilter* confirms that Section 2 plaintiffs must prove that a reapportionment plan denies them *equal* opportunity:

> Only if the reapportionment scheme has the effect of denying a protected class the *equal* opportunity to elect the candidate of choice does it violate § 2. Where such an effect has not been demonstrated, *§ 2 simply does not speak to the matter.*

Voinovich v. Quilter, 113 S. Ct. 1149, 1156 (1993) (emphasis added). *See also id.* at 1155 (Section 2 protects "the ability of a protected class to elect its candidate of choice on an equal basis with other voters"); *Thornburg v. Gingles*, 478 U.S. at 46. Thus, the determinative Section 2 issue in every vote dilution case must be whether the challenged electoral practice denies equal opportunity.[39]

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[38] The legislative history confirms this understanding of Section 2. The Senate Report makes clear that the 1982 amendment to Section 2 was intended to "codify" the analysis employed in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *White v. Regester*, 412 U.S. 755 (1973). *See* S. Rpt. No. 97-417, 97th Cong. 2nd Sess. 196-201 & 204-213 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177. These cases hold that proving a *downward departure from proportionality* is not *sufficient* to demonstrate vote dilution, but also make clear that a showing of disproportionate results is *necessary*. *White*, 412 U.S. at 765-66 ("to sustain [a vote dilution claim] it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open . . . in that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice."); *accord Whitcomb*, 403 U.S. at 149.

[39] Permitting a minimal deviation to demonstrate a violation would "[i]nvit[e] attack on minor departures from some supposed norm [which] would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from the legislative halls." *Davis v. Bandemer*, 478 U.S. 109, 133 (1986) (plurality opinion) (White, J.).

Furthermore, this Court's one-person one-vote jurisprudence recognizes that values of federalism and respect for the difficulties posed by state legislative reapportionment mandate that some leeway be provided for States to depart from a strict mathematical equality in order to vindicate state policies. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 740-41 (1938).

In *Thornburg v. Gingles*, this Court devised a test for evaluating whether plaintiffs challenging *multi-member* districts had made a threshold showing of unequal electoral opportunity:

> First, they must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, they must prove that the minority group is " 'politically cohesive.' " Third, the plaintiffs must establish " 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' "

See Voinovich v. Quilter, 113 S. Ct. at 1157 (summarizing *Gingles* threshold test for multi-member districts). The *Gingles* analysis compares the results in a multi-member district to results that would obtain if the multi-member district were divided into single-member districts. 478 U.S. at 50-51. If, as a result of racially polarized voting, a minority class is unable to elect its preferred representatives in the multi-member format and would be able to elect its preferred representatives in the single-member format, that is *prima facie* evidence that the multi-member format provides less than equal electoral opportunity.

The *Gingles* preconditions cannot, however, be mechanically transferred to the single-member district context. The preconditions remain relevant in single-member district cases, as this Court recognized in *Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993), and *Voinovich v. Quilter*,

113 S. Ct. at 1157, because they establish a causal link between the way districts are drawn and the minority's electoral opportunities.[40] Without more, however, the *Gingles* preconditions establish very little about whether challenged single-member districts deny *equal* electoral opportunity. Both *Voinovich* and *Growe* make clear that proof of the *Gingles* factors does not amount to a showing of vote dilution in the single-member context. The Court's reservation of this issue was doubtless premised on a recognition of the important differences between multi-member districts and single-member districts.[41]

The *Gingles* preconditions identify situations in which an alternative electoral system may provide minority citizens more electoral opportunity than the State's system provides. In a multi-member district case, proof of such "diminished opportunity" generally indicates a *prima facie* denial of *equal* electoral opportunity because the multi-member format has an inherent tendency to deny a minority population the ability to elect representatives in proportion to its percentage of the population. The issue in multi-member cases is *whether* single-member districts might be drawn that would alleviate the dilution by allowing minorities to elect preferred candidates. In *single-*

[40] As the Court explained in *Growe*:

> The "geographically compact minority" and "minority political cohesion" showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district. And the "minority political cohesion" and "majority bloc voting" showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population. Unless these points are established, there neither has been a wrong nor can be a remedy.

113 S. Ct. at 1084 (citations omitted).

[41] As a unanimous Court recently noted:

> multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts[.]

Growe v. Emison, 113 S. Ct. 1075, 1084 (1993). *Accord Thornburg v. Gingles*, 478 U.S. at 47; *Rogers v. Lodge*, 458 U.S. 613, 616-17 (1982); *Burns v. Richardson*, 384 U.S. 73, 88 (1966).

member district cases, however, the issue is *how many* single-member districts should be created in which minority voters can elect preferred candidates. That question would not even arise in a multi-member district case until the remedial stage of the proceedings.

The use of *Gingles* to identify additional single-member districts that hypothetically could be drawn does not answer the question of whether existing single-member districts deny a plaintiff class *equal* electoral opportunity. *Equal* opportunity is not denied merely because an apportionment fails to maximize the electoral opportunities of a minority class. Rather, whether the single-member districts in a challenged area deny equal electoral opportunity to a minority class depends in part on *how many* districts in the relevant geographic area afford that class an opportunity to elect its preferred candidates.

Indeed, as a matter of logic, the *Gingles* preconditions shed surprisingly little light on the critical issue of whether challenged single-member districts afford *equal* opportunity. For example, in a hypothetical 10-district jurisdiction with 100 voters per district (1,000 total voters), a group constituting only 50% of the population (500 voters) could control up to 9 of the 10 districts, so long as their geographic dispersion was such that 9 districts could be drawn each containing 51 members of the group ($9 \times 51 = 459$). Similarly, depending on how district lines are drawn, a group constituting only 38% of the population could control three of five legislative districts even when the minority group must have at least a 60% majority in a district to ensure election of a candidate of choice:

District	Group 1	Group 2	Total
1	0	20,000	20,000
2	0	20,000	20,000
3	12,666	7,334	20,000
4	12,666	7,334	20,000
5	12,668	7,332	20,000 [42]

[42] In this hypothetical, Group 1 makes up 38% of the population in an area which is to be divided into five districts of 20,000 persons

As these examples show, a mechanical application of the *Gingles* preconditions to single member districts amounts to a requirement that minority-controlled districts be maximized irrespective of whether the minority class has an equal opportunity to elect its preferred representatives.

For this reason, the *Gingles* preconditions, though necessary to show causation, cannot suffice to make out a *prima facie* case of vote dilution in single-member district cases. *See Gingles,* 478 U.S. at 94 (O'Connor, J., concurring) ("there is substantial doubt that Congress intended 'undiluted minority voting strength' to mean 'maximum feasible minority voting strength' "). Rather, a plaintiff class challenging single-member districts must be required to demonstrate that the challenged districts result in substantially unequal opportunity for that class to elect its preferred candidates. As a matter of law, such a showing should be foreclosed where the plan affords the plaintiffs the opportunity to elect preferred candidates in numbers commensurate with the plaintiffs' percentage of the population.

The Court has recognized this principle in related contexts. In *City of Richmond v. United States,* 422 U.S. 358 (1975), a case brought under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the Court concluded that, if minority "power . . . is not undervalued, and [minorities] will not be underrepresented" in a challenged plan, it would be impermissible to require that they be structurally ensured a greater than proportional opportunity to elect candidates of choice because this would "perhaps permanently overrepresent[] them and underrepresent[] other elements in the community . . ." *Id.* at 371. The logic of *City of Richmond* is fully applicable here, and precludes a finding of vote dilution absent a showing of substantially less than proportional electoral opportunity.

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each. The availability of advanced computer systems, which were used by many States during their most recent reapportionments, and detailed census data make this scenario achievable.

Indeed, the requirement that plaintiffs show less than equal opportunity to elect is implicit in *Gingles* itself. To satisfy the *Gingles* threshold test, a plaintiff must demonstrate that "a white bloc majority must *usually* be able to defeat" candidates supported by the minority group. *Gingles,* 478 U.S. at 49. As the Court explained in *Gingles,* this condition cannot be satisfied "unless minority group members experience substantial difficulty electing representatives of their choice." *Id.* at 49, n.15. If the minority group is able to elect a proportionate number of candidates, it cannot be said that the minority group's preferred candidates are "usually" defeated or that the minority group has "difficulty in electing" such candidates. *Id.*[43]

Accordingly, six Justices squarely held in *Gingles* that the "appellees failed to establish a violation of §2 in District 23" because the minority community in that district had historically elected a proportionate number of its preferred candidates. *Id.* at 105 (O'Connor, J., Burger, C.J., Rehnquist, J. (now C.J.), and Powell, J.); *id.* at 77 (Brennan, J., and White, J.) (same).

Of course, a *prima facie* case merely begins the judicial inquiry. Section 2 does not guarantee proportionate electoral results.[44] The statute specifically requires analy-

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[43] If, in this case, the *Gingles* preconditions were applied not to the two specific additional Hispanic districts identified by plaintiffs, but to the 20-district Dade County area in which plaintiffs allege vote dilution occurred, the preconditions would not be made out on this record. Plaintiffs cannot show that racial bloc voting usually defeats Hispanic-preferred candidates, or substantially impairs the ability of Hispanic voters to elect their preferred House candidates, because Hispanics can elect representatives in numbers commensurate with the Hispanic percentage of the voting age population. This is exactly how the Seventh Circuit recently analyzed a similar issue. *See Baird v. City of Indianapolis,* 976 F.2d at 360.

[44] Appellants do not suggest that the degree of minority electoral success should be determinative. Section 2 is intended to ensure equal access to the political process, not proportional representation. However, because Section 2 analysis focuses on expected electoral results at the *prima facie* stage, it is particularly important that

sis of the "totality of the circumstances," in which "a court should consider all relevant factors bearing on whether the minority group has 'less opportunity than other members of the electorate[.]'" *Gingles*, 478 U.S. at 99 (O'Connor, J., concurring).[45] It is simply not enough that a minority class has not elected representatives in proportion to its population levels. This failure to elect must, at bottom, be the product of a political system largely closed to the minority class. A Section 2 vote dilution challenge to the way single-member districts are drawn should not even proceed to this stage, however, unless plaintiffs have made a *prima facie* showing of *unequal* electoral opportunity.

B. A Proper Understanding of Section 2 Requires Reversal of the District Court's Finding That Florida Violated Section 2 By Failing to Create 11 Hispanic Districts in the Dade County Area

This Court must reverse the district court's finding that the State Plan violated Section 2 because plaintiffs did not prove, and the district court did not find, that Florida's reapportionment of the House seats for the Dade County area afforded Hispanic voters "less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice." Plaintiffs, therefore, did not even establish a *prima facie* case that would require a court to consider the "totality of the circumstances."

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plaintiffs be required to demonstrate that the electoral plan under challenge produces inequalities. It is also particularly important that, in cases where the *prima facie* showing of unequal electoral opportunity is made on the basis of anticipated electoral results, the reviewing court conduct a searching "totality of the circumstances" analysis to determine whether apparently unequal results are in fact indicative that a State's electoral system is closed to the plaintiff class.

[45] This analysis must also focus on a "State's justification for its electoral system." *See Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, 111 S. Ct. 2376, 2381 (1991). *Cf. Karcher v. Daggett*, 462 U.S. 725, 731 (1983).

The district court found that "Florida's House reapportionment plan creates twenty Dade County districts." J.S. App. 67a. The district court found that forty-five percent of those districts (9 of 20) will elect Hispanic-preferred candidates. J.S. App. 67a. Hispanics constitute approximately 45% of the voting age population of this 20-district area.[46] Furthermore, another district within the 20-district area contains an Hispanic voting age population of more than 45%, which may well afford Hispanics the ability to elect their preferred candidate in the near future.

Despite this evidence, the district court never asked the critical question: does the State Plan afford Hispanics in the Dade County area "less than equal opportunity to participate in the political process and elect representatives of their choice"? Instead, in its July 2, 1992 oral ruling, the district court held that the State Plan violated Section 2 because "plaintiffs have shown that more . . . districts may be drawn" than were drawn by the Florida legislature. VIII Tr. 82, J.S. App. 203a. The court reached this result by comparing the State Plan to alternative redistricting plans expressly designed to "maximize" the number of Hispanic-controlled districts in the Dade County area.[47] Similarly, the court's July 17, 1992, opinion focused exclusively on whether the three *Gingles* preconditions were met. At bottom, the district court in this case held that proof of the *Gingles* preconditions was both necessary *and* sufficient to sustain a Section 2 challenge.

The district court's mechanistic application of *Gingles* converted Section 2 into a requirement that minority electoral opportunity be maximized even where maximization would exceed proportional electoral opportunity.[48]

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[46] *See* note 10, *supra*.

[47] *See* note 31, *supra*, and accompanying text.

[48] If this holding were correct, States would be trapped in an endless cycle of Section 2 violations. The very relief accorded to one set of plaintiffs—the maximum possible number of districts—would

In essence, the district court treated *Gingles* as though it were itself a statute, rather than a threshold judicial test for ascertaining a possible denial of equal electoral opportunity. Thus, the district court asked only whether more minority districts could be drawn, but did not ask the "right question"—whether the failure to draw these districts denied plaintiffs " 'an equal opportunity to participate in the political processes and to elect candidates of their choice.' " *Gingles*, 478 U.S. at 44 (quoting S. Rep. at 28). Had the district court asked the right question, the court could not have concluded that the State Plan denied equal electoral opportunity. The State Plan plainly affords Hispanics in the Dade County area the opportunity to elect representatives of their choice in numbers commensurate with the Hispanic population percentage of the area.[49]

Even if plaintiffs had made a *prima facie* case of vote dilution—and they did not—the district court should be reversed. The court's excessive focus on the *Gingles* preconditions effectively precluded the searching "totality of the circumstances" analysis that Section 2 requires. *See Gingles*, 478 U.S. at 103 (O'Connor, J., concurring). It is simply implausible to argue that the political processes are not equally open to Dade County's Hispanic

itself create a new Section 2 violation as to another plaintiff class, whose voting strength would be diminished by the remedial plan. The district court's holding that the Senate Plan violated Section 2 —but could not be remedied—clearly demonstrates the perverse results which the court's theory entails.

[49] Indeed, once citizenship levels are properly taken into account, the State Plan provides Hispanic voters more electoral opportunity than their proportionate share of the citizen voting age population. Although the precise figures are disputed by the parties, there is no dispute that upwards of half of Dade County's Hispanic population is non-citizen. Because, as will be demonstrated *infra*, Section 2 protects the voting rights of citizens, there is no credible argument that the House reapportionment resulted in vote dilution. Indeed, once citizenship levels are taken into account, it would appear that Hispanic citizens have substantially more electoral opportunity than do Anglo citizens and African-American citizens in the Dade County area.

population. Within 2 decades of their arrival in substantial numbers, Dade County's Cuban-American population (the County's dominant Hispanic group) has become a powerful political force. Prior to the 1982 reapportionment, one member of the Florida House of Representatives was an Hispanic from Dade County. Stipulated Facts at ¶ 93, J.A. 27. As a result of the 1982 reapportionment, four Hispanics from Dade County were elected to the House. By the end of the 1980s, without any alterations of the districts drawn in the 1982 plan, seven Hispanics from Dade County held seats in the Florida House and two held seats in the Florida Senate. *Id.*[50] The State Plan for the 1990s increases those numbers. If plaintiffs have not yet achieved the measure of electoral success to which they aspire, that is plainly not the result of a denial of equal access to the political process.

C. The District Court's Judgment Cannot Be Sustained on Any Alternative Ground

Because the State Plan indisputably provides the plaintiff class with equal electoral opportunity in the Dade County area, Appellees now seek to defend the district court's judgment on grounds different from those they alleged at trial. The United States claims that the unarticulated "premise" of its case at trial "was that to remedy vote dilution throughout the State, the State was required to draw minority districts where it could"—*i.e.*, in Dade County. U.S. Motion to Affirm in No. 92-519, at 12. In other words, Appellees now argue that the Voting Rights Act requires the State of Florida to provide His-

[50] Also, during the 1980s, Hispanics were elected Governor of Florida, Mayor of Miami and Mayor of Hialeah. Moreno Affidavit at ¶¶ 27, 29, 36, J.A. 183, 184, 188. Hispanics were elected in substantial numbers to the Dade County Commission, the Dade County School Board, and other County offices. Stip. Facts at ¶¶ 72-75, J.A. 21. Hispanics constitute the majority of city commissioners in Hialeah, Miami, Sweetwater, Virginia Gardens, and West Miami. *Id.* at ¶ 92, J.A. 26. An Hispanic, Ileana Ros-Lehtinent, was elected to the United States Congress from Dade County in 1989. Moreno Affidavit at ¶ 34, J.A. 187.

panics in the Dade County area with *more* than proportional representation—at the expense of *other* Dade County populations—in order to ensure that Hispanics living in *other* parts of the State are "represented" in the Florida House of Representatives. This theory of liability—which appears nowhere in the District Court's lengthy opinion—finds no support in the record, cannot be squared with the compactness requirement of *Gingles*, and is incompatible with basic notions of representation in our system of government.

First, Appellees never tried to put on such a case at trial. The United States' complaint expressly alleged vote dilution in the 20-district "Dade County area."[51] Had the United States been advancing a theory of statewide vote dilution, there would have been no reason to identify this 20-district "Dade County area" as the area in which the alleged vote dilution occurred. The De Grandy plaintiffs initially alleged vote dilution in other counties, but offered no proof of those claims, and moved to dismiss the claim on the third day of trial. The following colloquy ensued:

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[51] Complaint of the United States at ¶¶ 8(a), 8(c), J.A. 75:

> In Dade County, Hispanic persons comprise a slight majority (50.5%) of the voting age population. The redistricting plan enacted by the State of Florida for the *House of Representatives* creates 20 districts in the Dade County area. The State's House plan fragments the Hispanic population concentrations such that Hispanics constitute a majority of the voting age population in only nine (9) districts.
>
> . . .
>
> The racial and ethnic population concentrations existing in the Dade County area are such that, if the Dade County area of the State is divided into equally populated legislative districts which respect communities of interest and follow other nondiscriminatory plan-drawing criteria, Hispanics would constitute a significant voting-age majority in two additional districts in the House of Representatives.

It should be recognized that this allegation mixes apples and oranges. Dade County is 50.5% Hispanic. But the 20-district Dade County area identified in the complaint is only 46.6% Hispanic. *See* note 10, *supra*.

> Judge Vinson: . . . De Grandy has already announced this morning that they're only pursuing Dade and Escambia Counties, correct?
>
> Mr. Cardenas: Yes, sir.

III Tr. 213. Immediately thereafter, Judge Stafford noted that this dismissal would "conform[] the pleadings to the eivdence," III Tr. 214, and Judge Hatchett entered the following ruling on the motion:

> The motion to dismiss is granted. Now that means that on the House side, the only attack is to Escambia County and Dade County. Everyone understand that? All of those other counties are out of the case.

III Tr. 214-15. Even if plaintiffs had been pursuing a statewide theory, their silence in the face of Judge Hatchett's statement waived any claims of vote dilution outside Dade and Escambia Counties. With respect to Escambia County, which is hundreds of miles from Dade County, plaintiffs alleged only African-American vote dilution, and that allegation was not litigated to a final judgment. Thus, *all* allegations of Hispanic vote dilution that proceeded to judgment involved Dade County. *See Brown v. Thomson*, 462 U.S. 835, 846 n.9 (1983).[52]

Second, appellees never proved the *Gingles* factors on a statewide basis. It is elemental that Section 2 plaintiffs must prove the existence of the *Gingles* preconditions. They cannot be assumed. *Growe*, 113 U.S. at 1085; *Gingles*, 478 U.S. at 46. It is also elemental that such proof must be co-extensive with the geographic area in which vote dilution is alleged. *Brown*, 462 U.S. at 846.

In particular, plaintiffs failed to prove the second *Gingles* precondition—that Hispanics in other parts of Florida are

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[52] In *Brown*, the Court refused to consider the constitutionality of the State of Wyoming's state legislative apportionment plan outside of Niobrara County because the "Appellants deliberately [] limited their challenge to the alleged dilution of their voting power" in that county. 462 U.S. at 846. The Court held that there is "no reason why [the plaintiffs] should not be bound by the choices they made when filing this lawsuit."

politically cohesive with Dade County Hispanics. Indeed, appellees argument suffers from exactly the flaw that led to reversal of the district court in *Growe v. Emison*. As this Court explained, where "dilution of the power of [] an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential." 113 S. Ct. at 1085. Since "a court may not presume bloc voting even within a single group," *id.*, this Court may not simply assume that Hispanics outside the Dade County area would be politically cohesive with Hispanics in the Dade County area. *See also Gingles*, 478 U.S. at 50-51 & n.17.

Moreover, the trial evidence refutes any claim of statewide cohesion. Plaintiffs' own expert on political cohesion, Dr. Dario Moreno, testified that he did not "look into" Hispanic political cohesion outside Dade County. III Tr. 292.[53] Plaintiff De Grandy testified that Representative Martinez, an Hispanic representative elected by the Hispanic population of Tampa, was not a member of the Hispanic Caucus because he was a Democrat who did not share the political views of Caucus members. De Grandy Testimony, IV Tr. 42-43, 52. All members of the Caucus are Cuban-Americans from Dade County, and all are Republican. Furthermore, plaintiffs' expert witnesses uniformly stressed that Dade County's Hispanic population was strongly Republican, and polarized with respect to African-Americans.[54] One testified that Hispanics in other parts of Florida were primarily Democrats who were politically cohesive with African-Americans. He specifically testified that Hispanics in the Tampa area [55] and the Palm Beach

[53] During the prior hearing on the congressional plan, Dr. Moreno similarly testified that he had "not looked at any data outside Dade County." IV Congressional Plan Trial Transcript ("Cong. Tr.") 317.

[54] *See, e.g.*, Moreno Affidavit at ¶¶ 25-29, J.A. 182-184.

[55] Affidavit of Dr. Thomas B. Hofeller at 7 ("Tampa's Hispanic community is predominantly Democrat and, as noted by the Department of Justice, is cohesive with black voters.") (June 22, 1992), J.A. 164.

area were politically cohesive with African-Americans, and voted for Democratic candidates.[56]

Plaintiffs also failed to prove the third *Gingles* precondition—that racial bloc voting usually defeats Hispanic candidates in other parts of Florida. Such evidence is critical to any "statewide" theory of dilution. It would make no sense to provide "virtual" representation of Hispanics who live outside the Dade County area by creating additional Hispanic-controlled districts in Dade County if those Hispanics can elect preferred candidates where they live and vote.

The trial record, moreover, makes clear that Hispanic voters in other parts of Florida *do* have the opportunity to elect their preferred candidates to the House of Representatives. For example, Hispanic voters in the Tampa area have for many years elected Representative Elvin Martinez, and will continue to have the opportunity to elect their preferred candidates under the State Plan. And, as plaintiffs' own expert testified, Hispanic voters in other parts of Florida are able to elect preferred candidates by allying with other voters.[57] Thus, appellees' theory of Section 2 liability must be reversed because "the *Gingles* preconditions were not only ignored but were unattainable." *Growe*, 113 S. Ct. at 1085.

Third, appellees' theory of liability is foreclosed as a matter of law because it effectively reads the first *Gingles* requirement—"compactness"—out of the law. As the Court explained in *Gingles*:

> [t]he reason that a minority group . . . must show, as a threshold matter, that it is *sufficiently large and*

[56] *See id.* at 7 (in the Palm Beach area, "[t]he district has an 11% hispanic population—primarily farm workers; who traditionally vote Democratic."), J.A. 167. Dr. Thomas B. Hofeller is Director of the Republican National Committee Reapportionment Office. He testified that "the goal of the committee for which I work is to elect as many Republicans as it can." X Cong. Tr. 59.

[57] Hofeller Affidavit at ¶ 28, J.A. 167.

> *geographically compact* to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.

Gingles, 478 U.S. at 50, n.17 (emphasis added).

The State Plan causes no hypothetical dilution of the voting strength of Hispanic residents outside Dade County —no showing has been made that those voters could elect preferred candidates under an alternative districting arrangement. Appellees' theory thus proposes to remedy vote dilution that has not been proven to exist.

Moreover, the *Gingles* compactness requirement must be understood as a rejection of the theory of "virtual" representation appellees now advance. The court could have chosen to interpret Section 2 to require that districts be drawn elsewhere if a minority population was not sufficiently numerous and compact, or it could have required States to draw non-contiguous districts to combine disparate minority population centers. The Court's choice of the compactness requirement quite properly recognizes that Section 2 was not intended to invalidate traditional geographic-based representation on which all state and federal legislative bodies are premised. Appellees' approach rests on the assumption that Hispanic legislators from Dade County, a densely populated urban area with substantial coastal and tourist industries, can effectively represent the interests of Mexican-American farm workers living in sparsely populated rural areas of Florida hundreds of miles away.[58]

Indeed, *Gingles* expressly rejected an identical argument. The district court found vote dilution with respect to District 23, despite the persistent proportional representation achieved by minorities in that district, because

[58] Pensacola, Florida, for example, is closer to St. Louis, Missouri than to Dade County. Indeed, Pensacola is closer to Indianapolis, Indiana than to Key West (which is part of the 20-district Dade County area at issue).

the "overall results" achieved by African-Americans in North Carolina fell far short of proportional representation based on the statewide African-American population.[59] This Court *reversed* the finding of liability with respect to District 23. As Justice O'Connor's concurring opinion explained, "[t]he district court clearly erred to the extent that it considered electoral success in the aggregate rather than in each of the challenged districts, since . . . 'the inquiry into the existence of vote dilution is district specific.'" 478 U.S. at 103; *see also id.* at 60, n.28.[60]

Fourth, even if Appellees' theory of liability were valid, the State Plan would nonetheless pass muster. As the United States has conceded on the basis of U.S. Census data, Hispanic citizens are proportionally represented in the Florida House of Representatives *on a statewide basis*.[61] Census Bureau data, which were available to the Department of Justice but not to appellants at the time of trial, show "that Hispanics constitute 7.15% of the citizen voting age population of Florida. Thus, if a plan had

[59] *Gingles v. Edmisten*, 590 F. Supp. 345, 367 (E.D.N.C. 1984).

[60] This Court's recent ruling in *African-American Voting Rights Legal Defense Fund, Inc. v. Blunt*, 61 U.S.L.W. 3682 (U.S. April 5, 1993), which summarily affirmed the three-judge court's ruling in *Nash v. Blunt*, 797 F. Supp. 1488 (W.D. Mo. 1992), confirms this reading of *Gingles*. In *Nash*, the plaintiffs challenged a reapportionment plan which provided African-Americans in relevant geographic areas with representation proportionate to the African-American populations in those areas. The plan did not, however, provide statewide proportional representation. The plaintiffs argued that additional African-American districts should have been created in areas of significant minority concentrations to ensure that, on a statewide basis, African-Americans had a proportionate share of seats. The district court rejected this theory of Section 2 liability. *Nash v. Blunt*, 797 F. Supp. at 1499. That portion of the district court's ruling was specifically challenged in the appellants' jurisdictional statement. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (summary affirmance "reject[s] the specific challenges presented in the statement of jurisdiction").

[61] *See* United States Motion To Affirm In Part And Vacate In Part, *Wetherell v. De Grandy*, No. 92-519 (U.S. Nov. 20, 1992).

been designed to afford Hispanics representation in proportion to their numbers in the *citizen* voting age population, it would apparently have eight or nine Hispanic seats (120 x 7.15% = 8.58)." U.S. Motion to Affirm at 14, n.5. The State Plan includes nine districts in Dade County and one district in the Tampa area where Hispanic voters elect their preferred representative.[62] Therefore, Hispanic citizens are afforded the opportunity to elect more than a proportionate number of candidates of choice on a statewide basis.[63]

Section 2 protects the "right of any *citizen* of the United States to vote." A violation is shown only if "the political processes leading to nomination or election . . . are not equally open to participation by members of a *class of citizens*." 42 U.S.C. § 1973 (emphasis added). *See also McNeil v. Springfield Park Dist.*, 851 F.2d 937, 945 (7th Cir. 1988) ("those ineligible to vote have not experienced a dilution of their vote" and may not be "parties to a Section 2 claim"), *cert. denied*, 490 U.S. 1031 (1989). Thus, proof of statewide proportionality for Hispanic *citizens* defeats appellees' statewide theory of liability.

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[62] There also is a district in Dade County in which Hispanics constitute 46% of the voting age population.

[63] This Court can rely on this Census data. Federal Rule of Evidence 201 authorizes judicial notice of a fact "at any stage of the proceeding," Fed. R. Ev. 201(f), including on appeal, 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5110, at 524-25 (1977), and at 270, n.15 (1992 Supp.) (both collecting cases). Courts routinely take judicial notice of Census data. *See, e.g., Barber v. Ponte*, 772 F.2d 982, 998 (1st Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986); *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1157 (5th Cir. 1981) (redistricting case); *Neal v. Coleburn*, 689 F. Supp. 1426, 1428 (E.D. Va. 1988) (same).

II. THE DISTRICT COURT'S FINDING THAT HISPANIC VOTERS ARE SUFFICIENTLY NUMEROUS AND GEOGRAPHICALLY COMPACT TO CONSTITUTE A MAJORITY IN ADDITIONAL SINGLE-MEMBER DISTRICTS WAS CLEARLY ERRONEOUS

Even with respect to Dade County, the district court's conclusion that the plaintiffs satisfied the geographic compactness component of *Gingles* was clearly erroneous. To satisfy this requirement, "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to *constitute a majority* in a single-member district." *Gingles*, 478 U.S. at 50 (emphasis added). Because "the purpose of [this requirement] is to first determine whether minorities are capable of commanding a majority vote in [additional] single-member district[s]," *Romero v. City of Pomona*, 883 F.2d 1418, 1425 (9th Cir. 1989) (Kozinski, J.), a plaintiff must submit evidence of the voting strength of eligible voters to satisfy it. Only United States citizens can vote for public office in Florida. Therefore, the voting strength of the plaintiff class must be assessed on the basis of its citizenship levels. *See id.* at 1426; *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 945 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989).

In this case, the plaintiffs based their claim of vote dilution on the total Hispanic voting age population (VAP) of Dade County. In Florida, however, Hispanic VAP is not a good estimate of voting strength because many Hispanics are not citizens. Defendants introduced expert testimony showing that 55% of Dade County's Hispanic population were not citizens. Plaintiffs contested this figure, but even plaintiffs' expert conceded that approximately half of the Hispanics in Dade County were not citizens. *See* Declaration of Allan J. Lichtman at ¶ 7 (June 30, 1992), J.A. 216.[64]

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[64] Defendants introduced the expert demographic testimony of William DeGrove showing that substantial portions of the voting

Plaintiffs made no effort to rebut this citizenship evidence. Instead, at trial, counsel for plaintiffs argued that requiring a showing of voting strength based on eligible voters "cannot be the law in this country." VIII Tr. 69, J.A. 485-86. The District Court agreed, ruling "as a matter of law that the relevant inquiry . . . is voting age population," and that "citizenship is not important." V Tr. 40, 47, J.A. 453, 455. Thus, when the district court entered judgment on July 2, 1992, it did so on the basis of the belief that it need not take citizenship into account in assessing Hispanic voting strength in Dade County.

In its July 17, 1992 opinion, the district court offered a different rationale. There, the court noted plaintiffs' expert testimony that Hispanic districts above 59% would be effective, J.S. App. 36a, and pointed to the "65% rule," which posits that supermajorities are needed in minority districts to account for factors that affect Hispanic turnout. The court stated that: "because each of the [plaintiffs' 11 proposed] districts contains a 60% Hispanic VAP and, therefore, 'satisfies' the 65 percent rule, the court need not further inquire as to the Hispanic citizenship levels in each proposed district." J.S. App. 40a.[65] The court then found that each of the plaintiffs' proposed districts "would . . . contain[] effective Hispanic voting majorities." *Id.* It is unclear whether the district court relied on the "65% rule" or on plaintiffs' expert testimony. This ruling was clearly erroneous in either event.

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age Hispanic population consisted of non-citizens. Based on standard court-accepted bivariate regression analysis, and recently released U.S. Census data on citizenship levels, DeGrove adjusted voting age population figures on a district-by-district basis for plaintiffs' proposed districts, and determined that Hispanic eligible voter levels fell below 50% in 8 of plaintiffs' 11 proposed Hispanic majority districts. DeGrove Testimony, VII Tr. 5-24, J.S. App. 187a-198a.

[65] The conclusion that 60% was adequate was based at least in part on the court's belief that, "[b]ecause the 65 percent rule already accounts for citizenship, making another adjustment for citizenship would overstate its importance and lead to double counting." J.S. App. 40a.

A. The Court's Reliance on the "65% Rule" Was Clearly Erroneous

The "65 percent rule" cannot support the district court's conclusion that the first *Gingles* precondition was met. The "65 percent rule" on which the district court relied is a benchmark for drawing *remedial plans. See Ketchum v. Byrne,* 740 F.2d 1398 (7th Cir. 1984), *cert. denied,* 471 U.S. 1135 (1985). To account for a minority community's generally younger median population age, lower voter registration patterns, and lower voter turnout, the "65 percent rule" suggests that remedial plans should generally include districts containing a 65% minority population to assure their effectiveness. *Id.* at 1415.

This general rule comes into play only *after* a plan has been found to violate Section 2; it may not be used as a presumption to prove that the first *Gingles* precondition is met. By relying upon such a presumption, the court disregarded the command of *Gingles* that plaintiffs' prove Section 2 vote dilution claims with district-specific evidence. "[C]ourts must not *rely* on data aggregated from all the challenged districts," 478 U.S. at 60 n.28, because vote dilution challenges require an "intensely local appraisal." *Thornburg v. Gingles,* 478 U.S. at 78 (quoting *White v. Regester,* 412 U.S. 755, 769-70 (1973)). As this Court emphasized in *Growe,* such a local appraisal forbids reliance on general studies or presumptions to satisfy the *Gingles* preconditions. *Growe,* 113 S. Ct. at 1085. Thus, the 65% rule cannot support a finding of liability.

Even if the application of the 65% rule may in some circumstances be appropriate, that presumption must be rejected if actual data is available. Indeed, *Ketchum v. Byrne,* the very case that first articulated the "65 percent rule," made clear that this presumption should be used only when actual data is unavailable. *See generally Ketchum,* 740 F.2d at 1416; *Nash v. Blunt,* 797 F. Supp. at 1499. The defendants submitted actual data to demonstrate that the eligible Hispanic voting age population would constitute a majority in only 3 of 11 districts proposed by

the plaintiffs. Plaintiffs' expert at trial conceded that approximately one-half of the Dade County Hispanic VAP were not citizens. *See* Lichtman Declaration at ¶ 7, J.A. 216. Thus, even if the "65 percent rule" could be relied upon to demonstrate satisfaction of the geographic compactness requirement—and it may not—it would not suffice in this case. The district court's refusal to consider appellants' actual data effectively elevated the "65 percent rule" into an irrebuttable presumption which is not permissible in this context.

B. The Court's Reliance on "Influence" District Evidence Was Clearly Erroneous

The district court's ruling is also clearly erroneous to the extent it relies on the testimony of plaintiffs' expert, Dr. Allan Lichtman. He expressly testified that plaintiffs' proposed districts would be "effective" in the sense that Hispanic voters in those districts could elect preferred candidates when their vote was combined with the substantial white cross-over vote in those districts.[66] In other words, Dr. Lichtman testified that most of plaintiffs' proposed 11 Hispanic districts would be "influence" districts, as this Court recently defined that term in *Voinovich v. Quilter*. 113 S. Ct. at 1149.[67]

This Court has not yet determined whether the failure to create influence districts may violate Section 2.[68] There

[66] Dr. Lichtman himself found that, in the elections he relied upon to conclude that the proposed districts would be "effective," there had been "a mean white vote of 24% for Hispanic candidates." Lichtman Affidavit at ¶ 7, J.A. 208. *See also* Lichtman Declaration at Table 1 (finding districts that would not contain a Hispanic majority would nevertheless be effective Hispanic districts because of the substantial white cross-over vote in those districts).

[67] In *Voinovich v. Quilter*, the Court explained that in an "influence district," minority voters "could not dictate electoral outcomes independently. But they could elect their candidate of choice nonetheless if they are numerous enough and their candidate attracts sufficient cross-over votes from white voters." 113 S. Ct. at 1155.

[68] *See Voinovich v. Quilter*, 113 S. Ct. at 1155 (expressly reserving question); *Growe v. Emison*, 113 S. Ct. at 1084, n.5 (same).

is reason to doubt whether such a failure violates Section 2 under any circumstances. *See Turner v. Arkansas*, 784 F. Supp. 553, 567-71 (E.D. Ark. 1991) (three-judge court), *aff'd*, 112 S. Ct. 2296 (1992). Indeed, the position of the United States in this litigation, which is based on Dr. Lichtman's testimony, would appear to be directly at odds with the position of the United States in *Voinovich v. Quilter* where the United States argued that the failure to create "influence districts" may *not* violate Section 2.[69]

But, at a minimum, the district court's judgment cannot be sustained merely on the basis that more "influence" districts might have been drawn.[70] The district court did not even purport to consider whether the State Plan denied equal electoral opportunity based on evidence that it created a slightly smaller number of districts in which Hispanic voters would have a strong chance to elect preferred candidates, rather than a larger number of districts in which Hispanic voters would have less opportunity to prevail because they would be dependent on substantial Anglo cross-over voting.

Moreover, permitting a Section 2 plaintiff to advance such a theory of liability raises intractable problems. States would be subjected to Section 2 challenges no matter which option they chose: a plan with strong minority districts would be susceptible to a challenge that a larger number of "influence" districts should have been created,

[69] *See* Brief for the United States in No. 91-1618, July 31, 1992, at 16 ("the legal theory adopted by the district court is directly at odds with the first *Gingles* precondition because it assumes that Section 2 requires creation of districts in which minorities are demonstrably *not* a majority of the voting age population. . . . We agree with those courts that have rejected such a notion.").

[70] Perhaps in reliance on Dr. Lichtman's testimony, the district court found that plaintiffs' proposed districts contained "*effective* Hispanic voting majorities." J.S. App. 40a (emphasis added). Dr. Lichtman's testimony would not support a finding that the proposed districts satisfy the geographic compactness requirement because, as Dr. Lichtman himself admitted, "I haven't studied citizenship levels at all in Dade County." Lichtman Testimony, III Tr. 73, J.A. 373.

and a plan with a larger number of "influence" districts would be susceptible to a *Gingles* challenge that majority-minority districts should have been created. Endorsing this theory of Section 2 liability would thus permit plaintiffs—rather than State legislautres—to determine the manner in which the requisite "equal opportunity" is assured.[71] Such an intrusion on legislative sovereignty is exactly what this Court's numerous admonishments that " 'reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court' " prohibit. *Growe*, 113 S. Ct. at 1081 (quoting *Chapman v. Meier*, 420 U.S. 1, 27 1975)).

III. THE DISTRICT COURT SHOULD HAVE DISMISSED PLAINTIFFS' CLAIMS BASED ON RES JUDICATA AND TRADITIONAL PRINCIPLES OF FEDERALISM

The district court refused to dismiss the plaintiffs' Section 2 challenges to the State Plan, notwithstanding that the De Grandy plaintiffs: (i) raised the identical claims *first* in a proceeding before the Florida Supreme Court and demanded that the court take jurisdiction over the claims; (ii) obtained the ruling they requested; and (iii) ignored the state court's offer of further consideration after a full evidentiary hearing. The District Court's refusal to dismiss was error.

This Court recently reaffirmed that the " '[t]he power of the judiciary of a State to require valid reapportionment . . . has not only been recognized by this court but appropriate action by the States in such cases has been

[71] It also would leave the State permanently unable to satisfy Section 2 because "[u]ndoubtedly some of [the minority] voters, as shown by this lawsuit, would prefer a more even distribution of minority groups among the . . . districts" while other minority voters would prefer fewer districts—like the State Plan's Hispanic House districts—in each of which the success of the minority preferred candidate was almost assured. *See Wright v. Rockefeller*, 376 U.S. 52, 57-58 (1964).

specifically encouraged.' " *Growe v. Emison*, 113 S. Ct. at 1081 (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965)). Thus, when a state supreme court enters a judgment resolving a reapportionment issue, "[*a*]*t the very least*, the elementary principles of federalism and comity embodied in the full faith and credit statute, 28 U.S.C. § 1738, obligates the federal court[s] to give that judgment legal effect[.]" *Id.* at 1082 (emphasis added).

The District Court erred by failing to accord the Florida Supreme Court's judgment full faith and credit, and in refusing to dismiss the De Grandy plaintiffs' claims based on principles of *res judicata*. The De Grandy plaintiffs were parties before the Florida Supreme Court.[72] At their behest, the Florida Supreme Court considered a Section 2 challenge to the State Plan. The court afforded them "a full and fair opportunity to litigate" these claims. *Allen v. McCurry*, 449 U.S. 90, 104 (1980). The court accepted briefs and evidentiary submissions, including alternative plans, *see* J.S. App. at 105a & 113a, and demonstrated that it was both "willing and able to protect" the plaintiffs' asserted federal rights. *Allen*, 449 U.S. at 104. Indeed, the court expressly retained jurisdiction to permit challengers to make an additional evidentiary showing before a commissioner on an expedited basis. *See* J.S. App. at 124a. The De Grandy plaintiffs chose not to avail themselves of this opportunity and instead brought the same Section 2 claims to federal district court. "The fact that [a party] failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 485 (1982). The Florida Supreme Court's judgment thus precludes relitiga-

[72] The preclusion principles must be applied to the claims of each party "as if [they] stood alone." *Doran v. Salem Inn., Inc.*, 422 U.S. 922, 928-29 (1975) (requiring independent application of abstention principles to each individual party). *See also Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 338-42 (5th Cir. 1982); *Smith v. United States Auto. Ass'n*, 259 So.2d 501 (Fla. App. 1st 1972) (same).

tion of any claims that were or could have been litigated. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 83 (1984).

In such circumstances, the federal courts must give the state court judgment the same preclusive effect that a Florida court would. *See University of Tennessee v. Elliott*, 478 U.S. 788 (1986); *Allen, supra.* Under Florida law, the Florida Supreme Court's judgment is entitled to *res judicata* effect. *Personnel One, Inc. v. John Sommerer & Co.*, 564 So.2d 1217, 1218 (Fla. App. 3d 1990). *See also generally Avant v. Hammond Jones, Inc.*, 79 So.2d 423 (Fla. 1955). Indeed, Art. III, § 16 of the Florida Constitution specifically bars subsequent litigation of challenges to new state legislative districts after the Court has completed its review of the reapportionment plan. *See* Fla. Const. Art. III, § 16(d); *Florida ex. rel. Landis v. Thompson*, 163 So. 270 (Fla. 1935). As *Growe* makes clear, the district court was obligated to give preclusive effect to the ruling as well.[73]

The Section 2 claims of the United States should likewise have been dismissed because those claims effectively required the district court to sit in judgment of the Florida Supreme Court on the Section 2 issues. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). "[T]o reverse or modify [a] judgment [of the state supreme court] . . . would be an exercise of appellate jurisdiction," *Rooker*, 263 U.S. at 416—which is exactly what this Court's decisions in *Rooker* and *Feldman* prohibit.

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[73] Moreover, as a three-judge court properly concluded in an identical situation, principles of comity and federalism underlying the abstention doctrine require dismissal in this context. *See Members of the California Democratic Congressional Delegation v. Eu*, 790 F. Supp. 925, 929 (N.D. Cal. 1992) (three-judge court). *See also Pennzoil v. Texaco*, 481 U.S. 1, 11 (1987). *See also Middlesex Co. Ethics Committee v. Garden State Bar. Ass'n*, 457 U.S. 423, 431 (1982); *Younger v. Harris*, 401 U.S. 37, 44 (1971).

The *Rooker/Feldman* doctrine bars federal court review of state adjudicative actions. *See Feldman*, 460 U.S. at 482 and n.15. In *Feldman*, the Court explained that adjudicative acts involve the application of existing laws to the facts of a particular case. *See Feldman*, 460 U.S. at 479. *See also Blake v. Papadakos*, 953 F.2d 68, 72 (3rd Cir. 1992). In this case, the Florida Supreme Court considered a Section 2 and several constitutional challenges to the State Plan and determined that the State Plan was in compliance with those provisions. The "adjudicatory" nature of this proceeding is heightened by the fact that the Florida Supreme Court "provided a detailed discussion of relevant law and its application." *Id.* at 73, n.4. A federal court is therefore prohibited from reviewing the resulting judgment. *See, e.g., Feldman*, 460 U.S. at 479.[74]

IV. THE REMEDY IMPOSED BY THE DISTRICT COURT MUST BE VACATED.

Even if the district court's liability determination is affirmed, its remedial order must be vacated, as the United States has conceded.[75]

This Court has repeatedly made clear that, "even after a federal court has found a districting plan unconstitutional, 'redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt.'" *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981) (quoting *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978)). For this reason, a court

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[74] *See also, e.g., Liedel v. Juvenile Court of Madison Co., Ala.*, 891 F.2d 1542, 1545 (11th Cir. 1990) (where requested relief "would effectively nullify [] state orders," review barred); *Anderson v. State of Colorado*, 793 F.2d 262, 264 (10th Cir. 1986) ("[T]his lawsuit essentially seeks to undo the [] decision of the Colorado state court. Therefore, it fits squarely within the parameters of the [*Rooker*]-*Feldman* doctrine prohibiting federal district courts from reviewing state-court judgments.").

[75] *See* United States Motion To Affirm In Part And Vacate In Part at 20, *Wetherell v. De Grandy*, No. 92-519 (U.S. Nov. 20, 1992).

must "give the legislature an opportunity to devise an acceptable replacement before itself undertaking the task of reapportionment." *Id.* In the present case, the district court transgressed this core principle of federalism by denying the State of Florida any appropriate opportunity to devise a remedial plan. Instead of permitting the State of Florida to construct a reapportionment plan consistent with the court's liability determination, the district court rushed to enter a remedial plan drawn by the De Grandy plaintiffs—and did so a mere five hours after the liability determination. Indeed, the district court did not even afford defendants a meaningful opportunity to study and comment on the plaintiffs' proposed remedy.

The district court's remedial order also invaded the State's traditional discretion to draw its own district map according to its own conception of the State's interests. As *Upham v. Seamon*, 456 U.S. 37 (1982), makes clear, a "district court's modifications of a state plan [must be] limited to those necessary to cure any constitutional or statutory defect," 456 U.S. at 43, and must "defer to the legislative judgments the [original] plan [] reflect[s]" to the maximum extent feasible. *Id.* at 40-41; *see also White v. Weiser*, 412 U.S. 783, 795 (1973). The modified De Grandy plan imposed by the district court goes far beyond those limits. To create two additional Hispanic majority districts in Dade County, the modified De Grandy plan substantially reconfigures all 31 House districts in South Florida. The remedial plan is not confined to Dade County or the Dade County area, and reshapes districts in areas that were not at issue in this case and for which no evidence of a Section 2 violation was submitted.[76]

The court's remedial order trenches unnecessarily on a host of important state interests. By altering the boundaries of House districts far beyond the area of the alleged Section 2 violation, the remedial plan unnecessarily ignores the important traditional boundary between Dade and Broward counties, and other traditional political divisions that the State Plan sought to preserve.[77] The plan fractures traditional Jewish communities of interest in the Dade County area that the State Plan was careful to preserve.[78] Finally, the plan amounts to a partisan gerrymander that significantly changes the political balance in the State. The modified De Grandy plan imposed by the district court appears consciously designed to minimize Democratic voting strength; the plan pairs 14 Democratic incumbents in newly drawn districts, and could lead to the defeat of as many as 11 Democratic incumbents in the Florida House.[79]

The court's remedial "finding" that the modified De Grandy plan minimized disruption of legitimate state policies is deserving of no weight because it lacks any evidentiary support. That conclusion rested principally on what the court described as the "testimony" of plaintiff De Grandy. J.S. App. 154a. During the remedial proceedings, however, Representative De Grandy did not testify; his statements were unsworn and were not subject to cross-examination. Thus, his "testimony" was not evidence and could not provide a proper foundation for the district court's remedial ruling.

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[76] *See* Affidavit of George H. Meier at 2 (July 2, 1992) (Exhibit 2 to House Defendants' Motion For Reconsideration), J.S. App. 152a-153a. Maps have been lodged with the Clerk of the Court which illustrate the differences between SJR 2-G and the modified De Grandy plan.

[77] *See* Logan Testimony, VII Tr. 81-84, 89-90, 93-94; Wallace Testimony, VII Tr. 165, 166 ("the sentiment on both sides of that county line was to try to respect the integrity of that boundary").

[78] *See* VII Tr. 118-121 (statement by counsel for *amici* with respect to the effect of plaintiffs' proposed remedies on traditional Jewish communities).

[79] Affidavit of Kimball Brace (July 2, 1992) (Exhibit 1 to House Defendants' Motion for Reconsideration), J.S. App. 154a-156a. In contrast, no Hispanic incumbents were paired in the State Plan. Meier Testimony, VI Tr. 215.

CONCLUSION

The district court's judgment should be reversed.

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Nos. 92-593, 92-767 and 92-519

IN THE

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On Appeal from the United States District Court for the Northern District of Florida

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QUESTIONS PRESENTED

1. Upon a finding of a violation of Section 2 of the Voting Rights Act with respect to African-Americans and Hispanics in a consolidated trial, should the district court have conducted full remedial proceedings prior to imposing, as a permanent remedy, the plan that it had found violated the Section 2 rights of African-Americans and Hispanics?

2. Whether the district court's factual findings that Florida Senate District 40 is a district in which African-Americans can—and ultimately did in November 1992—elect an African-American candidate of their choice is clearly erroneous, and, if not clearly erroneous, whether this Court need decide hypothetical questions about "influence" districts.

3. Whether the district court's findings with respect to the Florida House districts should be affirmed as not clearly erroneous.

PARTIES TO THE PROCEEDINGS

Respondent adopts the United States' statement.

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MIGUEL DE GRANDY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

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BRIEF FOR APPELLEE FLORIDA STATE CONFERENCE OF NAACP BRANCHES

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 7a-76a)[1] is reported at 815 Supp. 1550. An earlier decision in the same case with respect to congressional redistricting is reported at 794 F. Supp. 1076.

STATEMENT

The NAACP adopts the statement of the United States with the following additional details about (1) the evidence of Section 2 violations against African-Americans and (2) the evidence that Florida Senate District 40 would elect an African-American candidate.

1. On April 7, 1992, the Florida State Conference of NAACP Branches and twenty-six individual African-American voters (collectively the "NAACP") filed a lawsuit seeking declaratory and injunctive relief against congressional and legislative districts in Florida. *Florida State Conference of NAACP Branches* v. *Chiles*, No. 92-40131-WS (N.D. Fla., filed April 7, 1992). Two days later, the three-judge district court ordered the NAACP lawsuit consolidated with a lawsuit filed by Miguel De Grandy, a Hispanic member of the Florida House of Representatives, and other Hispanic registered voters. On June 26, 1992, the three-judge court ordered the consolidation of a separate lawsuit by the United States (filed on June 23, 1992) with the previously consolidated NAACP and De Grandy actions.

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[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 92-767, *United States* v. *Florida*. (The district court's judgment (J.S. App. 1a-6a) and opinion (J.S. App. 7a-76a) are also identically paginated in the Appendix to the Jurisdictional Statement in *Johnson* v. *De Grandy*, No. 92-519.) "JA" refers to the Joint Appendix in this Court, "Tr." to the transcript of proceedings in the district court, and "NAACP Ex. 1" to an exhibit introduced into evidence at trial.

Trial began on June 26, 1992 in the consolidated lawsuits.[2] Counsel for the United States, in opening statement, told the court that an additional Hispanic Senate seat in Dade County "will not diminish black voting strength in Dade County. . . ." Vol. I Tr. 47. Counsel for the NAACP replied:

> However, I would note to the Court that the Justice Department's representative has said here today that what they seek to accomplish on behalf of Hispanics in Dade County can be done without harming the interest of blacks in Dade County. Frankly, the NAACP remains unconvinced about that. We take that representation with a grain of salt, and we would like the Court to be very cognizant of that and pay close attention. . . . [Vol. I Tr. 66.]

The evidence at trial demonstrated that (1) African-Americans in Dade County and surrounding areas are politically cohesive, unite in large numbers behind candidates of their choice, and prefer African-American candidates in elections against candidates of other races;[3] (2) racially polarized voting in Dade County severely handicaps the ability of African-American voters to elect candidates of their choice;[4] and (3) African-Americans are sufficiently numerous and geographically compact to permit the drawing of three African-American voting age

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[2] The congressional redistricting issues had previously been resolved, *De Grandy* v. *Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992), and are not now before this Court. However, the district court took judicial notice of the evidence in the congressional redistricting case.

[3] Testimony of Dr. Allan J. Lichtman, JA 369; affidavit of Dr. Dario V. Moreno, JA 177, 182, 184.

[4] Affidavit of Dr. Moreno, JA 186, 191-93; testimony of Dr. Moreno, Vol. II Tr. 82 ("there is a high degree of tension in Dade County between the Afro-American population and the Hispanic population"); testimony of Dr. Lichtman, JA 369 and Vol. III Tr. 36 (instances where white and Hispanic voters in Dade County combined to defeat African-American candidates).

population (VAP) districts in south Florida.[5] Indeed, the so-called Burke-Wallace plan, which was adopted by the Florida House of Representatives but not by the Senate,[6] would have created three such African-American majority Senate districts.

Based on the evidence, the district court made factual findings—not challenged in these consolidated appeals. Pursuant to this Court's opinion in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), the district court found that (1) the Hispanics and African-Americans were each "politically cohesive among themselves but were not at all cohesive—and were often at odds—in relation to each other," and "[a]ll of the evidence indicated that Dade County's African-American community is cohesive," J.S. App. 44a, 47a; (2) "[t]here was a substantial amount of testimony . . . that voting in Dade County is racially polarized" and that "African-Americans have also been the victims of block [sic] voting." J.S. App. 49a, 52a; and (3) "[t]he NAACP has established that three geo-

[5] Testimony of John Guthrie, Staff Director of Senate Committee on Reapportionment, Vol. IV Tr. 201-02; *accord*, NAACP Ex. 1 (Burke-Wallace Plan).

[6] JA 427-28. The Burke-Wallace plan, NAACP Ex. 1, was initially ruled inadmissible in the NAACP's case-in-chief, Vol. III Tr. 123, but was later admitted into evidence. Vol. VI Tr. 188. Once admitted, NAACP Ex. 1 cured the previously expressed concern by NAACP counsel that "we were basically precluded from going forward with our Section 2 case," Vol. III Tr. 193, as was made clear in the NAACP closing argument. JA 473-75.

The use of the term "claim" in the United States' brief, P.5, line 1, requires clarification. The word should be limited to the description of the NAACP allegations in the preceding sentence and could not have been used synonymously with "complaint" or "count of a complaint." The district court's initial ruling was *not* that the NAACP's entire "claim" or complaint was untimely but that a particular document, NAACP Ex. 1, which was a constituent part of the "claim" or complaint, was untimely and would not be admitted into evidence. Presentation of oral evidence on this point was initially restricted on similar grounds. In any event, the evidentiary restriction was later reversed. Vol. VI Tr. 188.

graphically compact districts can be drawn in which African-Americans in Dade County would constitute a majority of the VAP and have the potential to elect candidates of their choice. The NAACP submitted a plan which creates three African-American VAP districts." J.S. App. 59a. The district court also made findings about the history of discrimination against African-Americans in Florida and Hispanics in Dade County. J.S. App. 53a-54a.

There was limited evidence before the district court about the effect of an additional Hispanic majority Senate district on African-Americans in Dade County, and the little evidence there was came during testimony in the liability phase of the trial. Cross-examination of expert witness Ronald Weber established that the Dade County Senate districts were "packed" with African-Americans (Vol. VI Tr. 135), that the three African-American districts in NAACP Ex. 1 would definitely elect African-Americans in districts 37 and 39 and possibly in 35 (Vol. VI Tr. 142, 163), and that a fourth Hispanic Senate seat in Dade County would "decimate" the opportunity for African-Americans in Dade County to elect representatives of their choice (Vol. VI Tr 68). Two NAACP witnesses also testified that to draw four Hispanic districts wholly within Dade County would prevent the drawing of two African-American districts wholly within Dade County (Vol. III Tr. 110, 143).

2. Senate District 40 in the state reapportionment plan was "designed to hold together politically cohesive African-American communities in South Dade County."[7] At the time it was drawn, Daryl Jones, an incumbent African-American member of the Florida House of Representatives, had announced his candidacy for Senate District 40. Representative Jones was elected to the House from a

[7] Government Ex. 14 at 3; Vol. I Tr. 39-40 (Florida Senate Response to U.S. Department of Justice Request for Further Explanation of SJR-2G).

district which had 26.7 percent African-American voting age population.[8] Senate District 40 is 34.5 percent African-American VAP and included much of Representative Jones' House District.[9]

Testimony at trial forecast that District 40 would elect an African-American Senator.[10] Based on the evidence, the district court found as a fact that Senate District 40 "performs as a third African-American district without adversely affecting Hispanics in the Dade County area." J.S. App. 66a.

In the November 1992 elections, Senate District 40, which the district court termed "a strong African-American influence district," J.S. App. 64a, did, in fact, elect an African-American Senator, Daryl Jones.[11]

SUMMARY OF ARGUMENT

In this consolidated appeal of three separate lawsuits, not a single party challenges the district court's findings of a Section 2 violation in the Senate districts in Dade County with respect to African-American plaintiffs. These issues are not before the Court and, in any event, the findings were not clearly erroneous.

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[8] *Id.*

[9] *Id.*

[10] Testimony of Leon Russell, first vice president of the Florida State Conference of NAACP Branches. Vol. III Tr. 136 (Daryl Jones, an African-American, will win Senate District 40); testimony of Representative Willie Logan, Chairman of the Florida Caucus of Black State Legislators, Vol. III Tr. 147.

[11] Although the November 1992 election results occurred post-trial and therefore are not in the trial record, this Court can take judicial notice of the certified copy of relevant pages from *Elections 1992; State of Florida Official General Election Returns: Nov. 3, 1992*, Fla. Dept. of State, Div. of Elections (hereinafter "1992 Official General Election Returns") which is attached as an Appendix to this brief. *Brown* v. *Piper*, 91 U.S. 37, 42 (1875) (judicial notice taken of the election of senators).

Failure to conduct a remedy hearing was error. The limited evidence of remedy at the liability trial was not sufficient to permit the court below to throw up its hands and declare that no remedy was possible. If, after a full remedial hearing, it appears that complete relief can be only accorded to one minority group, it should be that minority group which the court below finds to be the most historically disadvantaged in the affected political unit, here African-Americans in the Dade County area.

The proceedings in the Florida Supreme Court were expressly "without prejudice" to later assertion of Voting Rights Act claims that the state court's limited review neither resolved nor provided opportunity to resolve. Questions about "influence" districts, citizen voting age population (CVAP) and sustained electoral success necessary to prove a defense of proportional representation under *Thornburg v. Gingles*, 478 U.S. 30 (1986), are not necessary to the decision by the Court and, if reached, do not in any event affect the liability determination in favor of African-American plaintiffs arising out of the Senate districts in Dade County.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND LIABILITY UNDER SECTION 2 OF THE VOTING RIGHTS ACT IN FAVOR OF AFRICAN-AMERICAN PLAINTIFFS.

Although there was initial confusion in the district court about its liability holding, this confusion was dispelled by the court's opinion. J.S. App. 72a. As clarified, the district court found violations of Section 2 of the Voting Rights Act with respect to the Senate districts in Dade County, but on the record before it declined to order a remedy.

As to the determination of liability to African-American plaintiffs under Section 2 of the Voting Rights Act, the court below was clearly correct and amply supported by

the record.[12] None of the consolidated appeals before this Court challenges those findings of fact or that conclusion of law.

To the extent that several *amici*[13] contend that proof of the three threshold *Gingles* factors does not conclusively establish a Section 2 violation, this argument misstates the district court's holding "that the plaintiffs have satisfied each of the three elements *Gingles* requires *and* that when considered together with the Senate factors, the 'totality of circumstances' show that with respect to Florida's Senate plan, Hispanic and African-American vote dilution exists in Dade County in violation of § 2 of the Voting Rights Act." J.S. App. 30a (emphasis supplied). Even more to the point, *amici* may not raise questions not presented by the parties. *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.1 (1981); *Bell* v. *Wolfish*, 441 U.S. 520, 532 n.13 (1979). Since none of the parties has challenged the findings of Section 2 violations with respect to vote dilution of African-Americans in Senate districts, the *amici* may not do so.[14]

There was initial confusion below about the proper interplay of liability and remedy in the context of multiple—and perhaps competing—Section 2 claims in a consolidated lawsuit. Ultimately, the district court got it right—a plaintiff does not carry the burden in its liability case to prove the efficacy of any particular remedy. Nothing in the language of the Voting Rights Act of 1965 as amended,[15] the Senate report explaining the 1982 amend-

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[12] *See* the United States' brief, at 6-7.

[13] Brief *amicus curiae* of Anti-Defamation League of B'Nai B'rith at 10 *et seq.*; Brief *amici curiae* of the American Jewish Congress *et al.* at 41.

[14] Although the brief of the American Jewish Congress does not list a "Question Presented," it is apparent from topic heading III B and its entire argument that it is directly attacking this Court's plurality opinion in *Thornburg* v. *Gingles, supra.*

[15] 42 U.S.C. §§ 1973 *et seq.*

ments,[16] or this Court's decision in *Thornburg* v. *Gingles, supra,* imposes that additional burden on plaintiffs—or even contemplates it.

Such a result would be bad law and worse policy. If plaintiffs were required to prove remedy as an additional element of the liability case, it would contravene in large part this Court's prior holdings that the State must be given the first opportunity to submit a plan that remedies a Section 2 violation.[17] Sound considerations of the proper boundaries between legislative and judicial branches vest in the legislature the duty to choose among competing political values in drawing boundaries not otherwise required to redress legal violations. Moreover, as a practical matter, it is usually the State in the first instance that has access to superior data and computer technology to draw political boundaries to redress legal violations.

Accordingly, the liability determination should be affirmed.

II. REMEDIAL PROCEEDINGS WERE NECESSARY.

The district court did not hold a remedial hearing on the Senate districts.[18] Instead, it relied upon some of the evidence that had been introduced at the liability stage in order to support its conclusion in regard to remedy. The error here is manifest. If courts could dispense at will with remedial proceedings, particularly without advance notice to the parties, the liability phases of these already-complicated redistricting proceedings would be turned into a jumble of confusing evidence, as parties tried to make certain that they anticipated and dealt with every possible remedy in the event the court decided to forego the second stage.

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[16] S.Rep. No. 417, 97th Cong., 2d Sess. (1982).

[17] *Connor* v. *Finch*, 431 U.S. 407, 414-15 (1977); *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975); *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978) (opinion of White, J.).

[18] It held a short, same-day non-evidentiary proceeding on the House remedy.

There are valid reasons for a two-stage approach to redistricting. First, neither the courts nor the parties should have to spend valuable resources dealing with remedies unless it is clear—and the courts have already held—that there is liability. This necessarily means a two-stage process.

Second, although new evidence will undoubtedly be introduced, the parties at the remedial proceeding should also be able to build upon, explain or rebut the evidence relating to remedy tangentially introduced at the liability stage. This is not possible if the liability stage is on-going at the time the remedial evidence is submitted.

Third, holding a separate remedial hearing will give the parties time to develop and present various workable plans that the courts can then consider in light of the entire record. The problems inherent in the alternative approach are apparent from the instant record: during the liability stage, after a very short time to think about the matter, the NAACP representative was not able to construct a plan that he thought would accommodate both the Hispanic and African-American interests. This dilemma may have been subsequently solved, however, after more reflection and computer work-time could be devoted to the task. All of this confusion could easily have been avoided if the district court had made clear from the outset that remedies would not be addressed until after liability had been either proved or disproved.

The district court's remedial conclusion, although defensible if in the expedited context of a motion for preliminary injunction, is particularly suspect here where the court below denied a same-day motion for reconsideration that presented it with the very 4-3 plan that the court had found was not possible. JA 482. In truth, the 4-3 plan in all likelihood would have been proved possible and in any event should have been the subject of remedial proceedings.

In closing argument, counsel for the NAACP suggested the appropriate remedial course for the district court to follow:

> Now, for the sake of argument, assuming that this Court actually is faced with two viable claims in South Florida, how is this Court to resolve that problem? Of course, in an ideal world, the Court could simply order the drawing of four majority Hispanic districts and three majority black districts for the Senate. *If it is possible to accomplish that solution,* the NAACP supports that solution. NAACP does not seek to come into this Court and advance a claim on behalf of its members at the expense of another minority group.
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> * * * *
>
> On the other hand, what happens if this Court ultimately concludes that a 4/3 solution for the Senate in South Florida is not possible? What if there really are two viable and competing and mutually exclusive claims? And I submit to Your Honor that the solution at that point is to in effect give the edge to the minority group that has demonstrated historically the greatest difficulty in achieving political empowerment in South Florida. And I submit to Your Honor that the record is clear that that is African-Americans.
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> From the Congressional trial this Court has before it Census data that is replete with evidence that in South Florida, in areas of jobs and housing and education and health care, blacks are very, very seriously disadvantaged and comparably more disadvantaged than are Hispanic groups. The record also is replete with evidence that the Hispanic population in South Florida is growing much more rapidly than the black population of South Florida, thereby making it ever more difficult for blacks to elect their candidates of choice. [JA 475-76 (emphasis supplied).]

This is still the NAACP position: if a plan can be devised, as here, where both minority groups can be accommodated, that should be done; but in a situation where the two plans really are mutually exclusive, the advantage should be given to the historically most disadvantaged of the two groups, which in this case was the

African-American group. This approach provides a bright-line test that the NAACP respectfully commends to this Court as preferable to the district court's conclusion of violations for which there is no remedy.

The NAACP is *not* seeking in this Court an outcome as appellee that "would result in greater relief than was awarded . . . by the District Court." *Barry* v. *Varchi*, 443 U.S. 55, 69 n.1 (1979). As explained by the court below, J.S. App. 65a, the State plan created, in effect, a third African-American district in Senate District 40 that subsequently elected African-American Daryl Jones in November 1992.

In any event, while this Court certainly can provide guidance to the district court on the subject of mutually-exclusive remedies, we submit that the entire subject of remedies should be decided in the first instance by the district court at a remedial hearing after all parties are given an opportunity to appear and be heard.

III. THIS COURT NEED NOT REACH ANY HYPOTHETICAL QUESTION ABOUT "INFLUENCE" DISTRICTS.

As noted above, in November 1992 the voters of Florida Senate District 40 elected Daryl Jones, an African-American, to the State Senate.[19] Florida Senate District 40 is thus more than an "influence" district. The court below correctly found as a fact that African-Americans could elect a candidate of their choice in that district. It is a district today represented by an African-American Senator.

In light of this electoral development, the NAACP respectfully suggests that this case is not an appropriate vehicle for abstract speculation about "influence" districts. The entire discussion by the United States at pages 16-18

[19] Appendix at 3a.

of its brief, therefore, need not be addressed.[20] Here, as in *Voinovich*,[21] *Growe* [22] and *Gingles*,[23] hypothetical questions about influence districts can be preserved for another day and a proper case where they are directly presented.

IV. THE DISTRICT COURT PROPERLY DEFERRED JURISDICTION UNDER *GROWE* v. *EMISON* UNTIL STATE PROCEEDINGS WERE CONCLUDED.

Anticipating this Court's decision in *Growe* v. *Emison*, *supra*, the district court stayed this action until the conclusion of all state proceedings. The district court was clearly correct.

Any suggestion that the NAACP and others might be barred by *res judicata* or collateral estoppel by virtue of the Florida Supreme Court's proceedings misconstrues the limited review by that court. There was no full and fair opportunity to litigate the NAACP's Voting Rights Act claims in the two proceedings there. *Allen* v. *McCurry*, 449 U.S. 90 (1980). Indeed, as outlined below, the Florida Supreme Court said so expressly.

The proceedings in the Florida Supreme Court were original actions, by the state attorney general, pursuant to article III, section 16(c) of the Florida Constitution. That section mandates a judgment by the Florida Supreme Court within thirty days regarding the validity of

[20] The NAACP also agrees with the United States' earlier brief in opposition to motion to dismiss or affirm, No. 92-767 at pp. 9-10, that "[t]he difficult questions concerning the definition and legal status of influence districts in Section 2 litigation were not fully developed in this litigation . . ." and with its suggestion that "[t]he need to address those questions can be obviated by remanding the case to the district court for appropriate remedial proceedings." *Id.* at 10.

[21] *Voinovich* v. *Quilter*, 113 S.Ct. 1149, 1157-58 (1993).

[22] *Growe* v. *Emison*, 113 S.Ct. 1075, 1084 n.5 (1993).

[23] *Gingles*, 478 U.S. at 46-47 n.12.

a reapportionment plan. In its May 13, 1992 decision, the Florida Supreme Court acknowledged:

> At the same time, it is impossible for us to conduct the complete factual analysis contemplated by the Voting Rights Act, as interpreted in *Thornburg* v. *Gingles*, within the time constraints of article III, section 16(c). . . . Any decision which requires consideration of facts that are unavailable in our analysis will have to be resolved in subsequent litigation, as explained later in this opinion. [*In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 282 (Fla. 1992).]

The court's holding was specifically "without prejudice to the right of any protestor to question the validity of the plan by filing a petition in this Court alleging how the plan violates the Voting Rights Act." *Id.* at 285-86. This "without prejudice" language means that there was no adjudication on the merits of the Voting Rights Act issues and thus no *res judicata* effect, as this Court has recognized. *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 396 (1990). The NAACP chose to litigate in federal court, which had concurrent jurisdiction. J.S. App. 16a.

Subsequently, when the United States Department of Justice did not preclear Florida's reapportionment under Section 5 of the Voting Rights Act and the Florida legislature reached impasse, the Florida Supreme Court, pursuant to the Florida Constitution, adopted a revised Florida reapportionment plan that resolved the Section 5 objections. The limited nature of the second Florida Supreme Court proceeding was emphasized by its Chief Justice, who stressed that "this Court's review in the present proceeding is limited in scope to DOJ's section 5 preclearance inquiry. . . ." *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 601 So. 2d 543, 548 (1992) (Shaw, C.J., specially concurring).

Neither *res judicata* nor collateral estoppel is therefore applicable here.

V. PROPORTIONAL REPRESENTATION IS NOT AN ABSOLUTE DEFENSE.

Proportional representation is neither an absolute floor nor an absolute ceiling under Section 2 of the Voting Rights Act. The Act itself expressly disclaims that proportional representation is any type of floor for equal political opportunity for minorities. 42 U.S.C. § 1973(b). Neither is proportional representation, without evidence of sustained electoral success, a ceiling on equal political opportunity. This Court so held in *Thornburg* v. *Gingles*, 478 U.S. at 77 (opinion of Brennan, J.); *id.* at 102 (O'Connor, J., concurring in judgment) ("I agree with Justice Brennan that *consistent and sustained success* by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation") (emphasis supplied).

The statutory test under Section 2(b) requires examination of the "totality of the circumstances." As this Court stated in *Gingles*:

> Section 2(b) provides that "[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered." 42 U.S.C. § 1973(b). The Senate Committee Report also identifies the extent to which minority candidates have succeeded as a pertinent factor. S. Rep. at 29. However, the Senate Report expressly states that "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote,' " noting that if it did, "the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a 'safe' minority candidate." *Id.*, at 29, n. 115 [citations omitted]. The Senate Committee decided, instead, to " 'require an independent consideration of the record.' " S.Rep. 29, n. 115. The Senate Report also

> emphasizes that the question whether "the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.'" *Id.*, at 30 (footnote omitted). Thus, the language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim. [478 U.S. at 75.]

Applying the "totality of circumstances" test, this Court in *Gingles* held that *sustained* electoral success in *the last six elections* that resulted in proportional representation of African-American residents in House District 23 was a successful defense negating any allegation of unequal opportunity to elect representatives of choice by African-Americans. *Id.* at 77. This Court rejected the contention of appellants "that if a racial minority gains proportional or nearly proportional representation *in a single election*, that fact alone precludes, as a matter of law, finding a § 2 violation." *Id.* at 75 (emphasis supplied).

Similarly here, in the absence of a showing of sustained electoral success, proportional representation is but one factor in the totality of circumstances to be taken into account. The court below considered the evidence, gave it proper weight and committed no error.[24]

Since proportional representation is not an absolute defense but only one of several factors in the "totality of circumstances", issues as to its measurement (*i.e.*, total population, VAP or CVAP) take on less importance in this case and may well vary from case to case depending on local circumstances. The measurement issue was left open by this Court in *Growe* v. *Emison*, 113 S.Ct. at 1083 n.4.

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[24] The court considered evidence both statewide and with respect to the Dade County area. Both are part of the "totality of circumstances"; House appellants unduly emphasize County statistics alone. With respect to African-Americans, the court below made extensive statewide findings about past discrimination in Florida against African-Americans. *See, e.g.*, J.S. App. 53a-54a.

In this case, the district court made detailed findings of fact about the use of VAP,[25] the need for a Hispanic supermajority VAP to take into account lower citizen and registration rates,[26] and the use of a lower majority VAP for African-Americans reflecting recent increases in African-American turnout and voter registration.[27] The court, noting the unavailability of CVAP data, heard testimony of estimates of noncitizenship among Hispanics, found certain estimates to be unreliable,[28] and relied instead on an analysis of past election results by Dr. Lichtman to estimate noncitizen rates.[29]

In short, the district court did precisely what this Court, in *Gingles*, indicated had to be done. It made careful factual findings about the impact of non-citizenship. There is no need for this Court to reach, much less reverse, those findings.

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[25] J.S. App. 31a *et seq.*

[26] J.S. App. 32a *et seq.*

[27] J.A. App. 39a-40a.

[28] J.S. App. 74a (Vinson, J., concurring).

[29] J.S. App. 75a (Vinson, J., concurring).

CONCLUSION

The NAACP respectfully submits, for the reasons set forth above, that the liability findings of the district court should be affirmed, the permanent remedial plan should be vacated and remanded for a full evidentiary hearing, and this Court should not reach or decide hypothetical issues about influence districts and CVAP.

Respectfully submitted,

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APPENDIX

APPENDIX

STATE OF FLORIDA

DEPARTMENT OF STATE

Division of Elections

I, Jim Smith, Secretary of State of the State of Florida, do hereby certify that the attached are true and correct copies of the 1992 primary and general election results for States Senate District 40, as shown by the records of this office.

[SEAL]

Given under my hand and the Great Seal of the State of Florida, at Tallahassee, the Capital, this the 12th day of May A.D., 1993

/s/ Jim Smith
JIM SMITH
Secretary of State

Democratic September 1 & 8, 1992, Primary Election (Con't)

State Senate

District 40

County	Susan Guber	Daryl L. Jones
Dade	2,409	9,510
Monroe	3,628	2,282
Totals	6,037	11,792
Percent	33.9	66.1

Elected Without Opposition (Con't)

Sixteenth Judicial Circuit
Rand Winter

Eighteenth Judicial Circuit
J. R. Russo

Nineteenth Judicial Circuit
Diamond R. Horne

State Senate

Third Senatorial District
Pat Thomas

Fourth Senatorial District
Charles Williams

Eighth Senatorial District
William G. "Bill" Bankhead

Twenty-First Senatorial District
James T. (Jim) Hargrett, Jr.

Twenty-Second Senatorial District
Don Sullivan

Twenty-Fifth Senatorial District
Fred R. Dudley

Twenty-Ninth Senatorial District
Kenneth C. Jenne, II

Thirty-Second Senatorial District
Howard C. Forman

Thirty-Third Senatorial District
Peter M. Weinstein

Thirty-Sixth Senatorial District
William H. Turner

Thirty-Eighth Senatorial District
Ronald (Ron) A. Silver

Thirty-Ninth Senatorial District
Roberto Casas

Fortieth Senatorial District
Daryl L. Jones

State Representative

Third House District
Buzz Ritchie

Fifth House District
Sam Mitchell

Sixth House District
Scott Clemons

Seventh House District
Robert D. Trammell

Eighth House District
Alfred "Al" Lawson, Jr.

Ninth House District
Hurley W. Rudd

Tenth House District
F. Allen Boyd, Jr.

Fourteenth House District
Anthony "Tony" Hill

Fifteenth House District
Willye F. Dennis

Seventeenth House District
James E. "Jim" King, Jr.

Eighteenth House District
Joe Arnall

Ninteenth House District
John Thrasher

Twenty-Third House District
Cynthia Moore Chestnut

Twenty-Fourth House
District
George Albright

Twenty-Seventh House
District
Jimmy Charles

Thirty-Fourth House District
Bob Starks

No. 92-519 (17)

JUN 1 1993
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1992

BOLLEY JOHNSON, et al.
Appellants,

v.

MIGUEL DE GRANDY, et al.
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

APPELLEES' BRIEF

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QUESTIONS PRESENTED

Upon a trial under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, the three-judge district court imposed a remedial districting plan for the Florida House of Representatives. The questions presented are:

1. Whether, after fully reviewing evidence pertaining to the Gingles preconditions and the "totality of the circumstances," the district court's findings were "clearly erroneous" in rejecting the House Appellants' per se defense of proportionality their and unorthodox evidence regarding citizen voting age population.

2. Whether the De Grandy Appellees established illegal vote dilution when they propounded additional minority districts in which the Gingles preconditions were present and the totality of the circumstances evinced a persistent history of invidious discrimination.

3. Whether the abstention doctrine bars Appellees from asserting claims under the Voting Rights Act when no state court action was pending and no state court has ever adjudicated those claims.

4. Whether the district court erred in imposing a remedial plan when the 1992 election was imminent and the state had offered two plans that failed to remedy proven dilution of the Hispanic vote in south Florida.

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No. 92-519

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

BOLLEY JOHNSON, et al.

Appellants,

v.

MIGUEL DE GRANDY, et al.

Appellees.

**On Appeal From The United States District Court
For The Northern District Of Florida
Tallahassee Division**

APPELLEES' BRIEF

OPINIONS BELOW

The July 2, 1992, judgment and July 17, 1992, opinion of the three-judge court for the Northern District of Florida, Tallahassee Division, which implemented redistricting of the state legislative districts in Florida, are unreported. Each is set out in the Appendix to the De Grandy Jurisdictional Statement (App. 1-92). The May 29, 1992, opinion of the district court apportioning congressional districts for the State of Florida is reported at 794 F. Supp. 1076.

STATEMENT OF THE CASE

Contrary to the assertions of the House Appellants,[1] the district court properly applied the vote dilution analysis established by this Court in Thornburg v. Gingles, 478 U.S. 30 (1986). First, it analyzed the facts relating to the three Gingles preconditions to a prima facie case. Then, it reviewed extensive testimony concerning voting history, minority group representation, discrimination against Hispanics, the lingering effects of disparate socioeconomic circumstances and other factors relevant to "totality of the circumstances." Based upon this complete analysis, the court found Hispanic vote dilution in clear violation of the Voting Rights Act and, with the 1992 elections imminent, imposed a remedial plan for the Florida House of Representatives.

The House Appellants do not challenge the lower court's findings regarding Hispanic group cohesiveness or racially polarized voting -- two of the three threshold Gingles factors that lead to Section 2 liability.[2] Instead,

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[1] The legislative and executive officials of the state of Florida who appeal the district court's judgment with respect to the Florida House of Representatives in No. 92-519 are collectively referred to herein as the "House Appellants."

[2] Indeed, in their amicus brief in Shaw v. Reno, they affirmatively relied on these findings:

> [T]he findings . . . in Wetherell v. De Grandy demonstrate that the State of Florida did have a compelling interest in considering minority interests because Dade County is characterized by racially polarized voting and Hispanic citizens are politically cohesive.

(continued...)

they question the lower court's finding that the admittedly cohesive Hispanic population in south Florida is sufficiently large and geographically compact to constitute an effective voting majority in eleven state House districts, rather than in only nine districts as established by the challenged state plan.

Additionally, the House Appellants seek to avoid the consequences of the lower court's Section 2 liability findings by arguing (1) that a "proportional" allocation of House seats (based on voting age population but limited to the Hispanics in Dade County) provides a per se defense to a Section 2 case; (2) that there were procedural defects in the remedial phase of the hearing; and (3) that the De Grandy Appellees'[3] federal rights were adjudicated in a state forum that expressly disclaimed any such holding. Because these arguments lack merit, and because the House Appellants have identified no "clearly erroneous" findings,[4] the decision of the lower court should be affirmed with respect to the Florida House of Representatives, and the lower court's remedial order apportioning the Florida

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[2](...continued)
Brief of Bolley Johnson, Speaker of the Florida House of Representatives and Peter A. Wallace, Chairman of the Reapportionment Committee of the Florida House of Representatives, Amici Curiae in Shaw v. Reno, No. 92-357 (appeal pending) (1992).

[3] Miguel De Grandy and the other plaintiffs in De Grandy v. Wetherell, who are the appellees in No. 92-519 are collectively referred to herein as the "De Grandy Appellees" or "Appellees."

[4] In Gingles, this Court "reaffirm[ed] our view that the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution." 478 U.S. at 79.

House in compliance with the Voting Rights Act should be implemented.[5]

A. Background.

In a special legislative session on April 10, 1992, after a three-judge federal panel had assumed jurisdiction of the De Grandy Appellees' Equal Protection and Voting Rights Act claims, the Florida legislature passed Senate Joint Resolution 2-G ("SJR 2-G" or "the state plan"), which reapportioned the Florida Senate and House of Representatives on the basis of the 1990 census. The results of the census demonstrated tremendous demographic changes and a statewide population increase of more than three million persons. The state plan established nine House and three Senate districts in the Dade County area, and packed into each Hispanic voting age population supermajorities of 69 percent or higher. In passing the state plan, the legislature rejected alternative plans that had been proposed for south Florida and that would have provided the Hispanic community there with an opportunity to elect eleven state House members and four state Senators of their choice.

After a trial on the merits, the district court agreed with the De Grandy Appellees that the state plan impermissibly diluted Hispanic voting strength with regard to the state House.[6] Hispanics in the State of Florida comprise

[5] This Court entered orders staying the lower court judgment pending appellate consideration. See Stay Orders in No. A-32 and No. A-51.

[6] The district court also found that the state plan for state Senate districts in the Dade County area violated Section 2 of the Voting Rights Act but failed to order a remedy. That error is the subject of the De Grandy appeal in No. 92-593.

12.17 percent of the population of the state and 11.73 percent of the state's voting age population. If Hispanics were represented in proportion to their percentage of the population, they would hold 14 House seats, but, in the 1992 elections held under the state plan, Hispanics elected representatives to only ten, or 8.25 percent, of the state House seats.

B. The Federal Lawsuit.

On January 13, 1992, the De Grandy Appellees filed suit in the United States District Court for the Northern District of Florida, alleging that existing congressional and state legislative districts violated Section 2[7] and that the Florida legislature would not pass a legislative reapportionment[8] plan meeting all constitutional and statutory requirements sufficiently in advance of scheduled elections to afford the De Grandy Appellees the opportunity to mount effective campaigns and to participate equally in the 1992 elections. Accordingly, the De Grandy Appellees requested that the federal court accept jurisdiction, establish a scheduling order and, thereafter, if necessary, prepare congressional and state legislative plans of apportionment that would become effective in June 1992, prior to the

[7] In contrast to House Appellants' assertions (see House Appellants' Brief at 9), the De Grandy Appellees' complaint alleged violations of Section 2 from the outset. App. 9. ("App." references are made to the Appendix to the De Grandy Jurisdictional Statement in No. 92-593.)

[8] Although "reapportionment" technically refers to the process of distributing seats in the United States House of Representatives among the several states, the Florida Constitution uses the word "apportionment" to describe its process of determining the number of legislative seats and establishing district lines. The court below used the term "reapportionment" to describe both the state's process and the establishment of district lines for congressional districts. This Brief adopts the terminology of the court below.

scheduled period of qualifying for the impending election.

The De Grandy Appellees did not request the federal court to enjoin the state legislature's effort to pass apportionment plans. Rather, Appellees suggested that the three-judge panel permit the legislature to proceed while the court itself was simultaneously developing redistricting plans, to guard against the event that the legislative process would not produce acceptable plans sufficiently in advance of qualifying for the 1992 elections. The federal court, however, dismissed the De Grandy Appellees' original complaint without prejudice, deferring to the state's legislative process and the state's assertions that congressional and legislative plans would be adopted and in place well in advance of the qualifying deadline.

Despite this immediate time constraint, however, the regular session of the state legislature ended in March 1992, without passage of any apportionment plan. As a result, the legislature was deadlocked, and the De Grandy Appellees filed their second amended complaint, renewing the request that the federal court take jurisdiction to ensure that some apportionment plan, whether legislative or court-ordered, be in place in advance of qualifying for the 1992 elections.[9] The court denied the House Appellants' renewed motions to dismiss, accepted jurisdiction, and established a scheduling order whereby congressional and legislative plans would be submitted by May 29, 1992. In entering the scheduling order, the three-judge district court announced that it was not enjoining any state proceedings or any effort by the state legislature to adopt apportionment plans. App. 12.

[9] The second amended complaint also contained claims under both Section 2 and the Fourteenth Amendment. App. 9. See n.7, supra.

Two weeks after acceptance of jurisdiction by the federal court, the Florida legislature passed SJR 2-G reapportioning the state House of Representatives and state Senate. No congressional plan was passed. The federal court immediately delayed trial on state apportionment but maintained its schedule with respect to congressional redistricting.

C. State Supreme Court Review Of The Joint Resolution.

Florida's Constitution establishes a unique, quasi-legislative role for its supreme court in the reapportionment process. The state legislature is directed to reapportion Florida's congressional delegation and the state House of Representatives and Senate (based upon the decennial census), and establishes a process to achieve that result.[10] Fla. Const. art. III, § 16. If the legislature fails to pass a joint resolution of state legislative apportionment in regular session, it must meet in special session. If the legislature fails to pass a plan in special session, the Florida Supreme Court must assume a legislative role and adopt its own plan. Fla. Const. art. III, § 16(f).

Should the legislature pass a joint resolution of apportionment, the enactment process requires the joint resolution to be submitted to the Florida Supreme Court for a special 30-day review. This 30-day review is designated as a "declaration" and is nothing more than a review of the resolution "on its face." In re Senate Joint Resolution No. 1305, 263 So. 2d 797, 808 (Fla. 1972). Although the

[10] The Florida legislature failed to adopt a plan for congressional reapportionment, forcing the federal court to devise a plan that was adopted and implemented for the 1992 elections. The court-imposed congressional plan was not appealed. See De Grandy v. Wetherell, 794 F. Supp. 1076 (N.D. Fla. 1992).

House Appellants now characterize the proceeding as a "full evidentiary hearing" (House Appellants' Brief at 44), in fact, no evidence was taken, no cross-examination was permitted and the merits were decided solely on the basis of briefs and oral argument. The court did not resolve issues of disputed fact or make factual findings.[11]

Once the court has conducted its facial review and held the plan valid, it becomes effective under state law, subject only to preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c) and 28 C.F.R. § 51.1, et seq. In prior reapportionment cases, the Florida Supreme Court has established that challenges to an apportionment plan under Section 2 of the Voting Rights Act are to be conducted in separate trial proceedings. In re Senate Joint Resolution No. 1305, 263 So. 2d 797 (Fla. 1972).

During the state supreme court review of the state plan involved in this case, both houses of the legislature argued that the Florida Supreme Court could not determine whether the state plan complied with Section 2 of the Voting Rights Act:

> This Court's instant review cannot be dispositive of the ultimate Section 2 determination. Section 2 requires an "intensely local appraisal of the design and impact mechanism" and a "flexible, fact-intensive inquiry into the past and present reality of the political process" . . . an inquiry beyond the scope of this Court's Article III, Section 16 review.

[11] Unlike all other Florida laws, reapportionment is not subject to a gubernatorial veto, a limitation which is consistent with the quasi-legislative role of the state supreme court in connection with apportionment. See Fla. Const. art. III, § 16.

Joint Brief of the Legislature at 17. The Florida Attorney General took the same position:

> A Section 2 challenge requires a detailed, complex factual inquiry into the underlying application of the redistricting plan. The question of whether the political processes are equally open depends on a searching and practical evaluation of the past and present reality and on a functional view of the political process. This determination is peculiarly dependent upon the facts of such case. . . . A Section 2 claim for the purposes of this Court's jurisdiction is not a facial constitutional claim; therefore, any Section 2 implication is not properly before this Court in this proceeding.

Brief of the Attorney General at 25.

In contrast, the De Grandy Appellees urged the Florida Supreme Court to conduct a complete trial -- with testimony under oath and subject to cross examination -- to determine whether the Joint Resolution violated Section 2. De Grandy Appellees also asserted that any attempt to determine the plan's compliance with the Voting Rights Act without evidentiary proceedings would be unconstitutional. State Brief of De Grandy at 9.

The Florida Supreme Court, however, agreed with the state officials and rejected the De Grandy Appellees' request for an adjudication of their Section 2 claims, holding:

> [I]t is impossible for us to conduct the complete factual analysis contemplated by the Voting Rights Act, as interpreted in

> Thornburg v. Gingles, within the time constraints of Article III, Section 16(c).

In re Senate Joint Resolution 2G, 597 So. 2d 276, 282 (Fla. 1992). Because necessary fact-finding and factual analysis were impossible, the court held that a Section 2 challenge would have to come at a later time:

> Any decision which requires consideration of facts that are unavailable in our analysis will have to be resolved in subsequent litigation . . . .

Id. at 282.[12]

Thus, the Florida Constitution assigns to the Florida Supreme Court a quasi-legislative role in the reapportionment process. The court's summary conclusion that the Joint Resolution did not discriminate against minorities was expressly qualified by "the limitations of [its] review, including both time constraints and the unavailability of specific factual findings. . . ." Id. at 285. Accordingly, the court entered its decision without prejudice to a future Section 2 challenge:

[12] In his dissent, Chief Justice Shaw agreed with that portion of the majority opinion which determined that the Florida Supreme Court could not conduct a Section 2 analysis in the facial review proceeding:

> [T]his Court cannot in the present proceeding conduct the kind of fact-intensive analysis required in a direct challenge to an existing plan under the Voting Rights Act . . . .

Id. at 289.

> We acknowledge that any interested person should have the opportunity to attempt to prove that the Joint Resolution is invalid through a presentation of evidence in accordance with the Gingles analysis of the Voting Rights Act. Therefore, our holding is without prejudice to the right of any protestor to question the validity of the plan by filing a petition in this Court alleging how the plan violates the Voting Rights Act.

Id. at 285-86. Thus, the House Appellants' assertion that the De Grandy Appellees "obtained the ruling they requested" in the Florida Supreme Court, House Appellants' Brief at 44, is without support in the record.

D. Section 5 Review.

On May 13, 1992, the Florida Supreme Court issued its initial order approving SJR 2-G, In re Senate Joint Resolution 2G, 597 So. 2d 276 (Fla. 1992), which was then submitted to the Justice Department for Section 5 review. On June 16, 1992, the Attorney General of the United States interposed an objection to the state plan with regard to state Senate districts in Hillsborough County.[13,14] App. 14. As a result, the Florida Supreme

[13] Dade County is not subject to Section 5 of the Voting Rights Act. Only five Florida counties are covered by the Section 5 preclearance requirements: Collier, Hardee, Hendry, Hillsborough, and Monroe. 28 C.F.R. 51, App.

[14] Despite the Florida Supreme Court's "facial review" of SJR 2-G and its determination that the plan "does not discriminate against minorities," the Department of Justice refused to preclear Florida's Senate plan under Section 5 of the Voting Rights Act, because the State of Florida could not prove that its reapportionment plan was free of

(continued...)

Court returned the ineffective state plan to the legislature with an order "encouraging the Legislature to adopt a plan that would meet the objection of the Justice Department." In re Senate Joint Resolution 2G, 601 So. 2d 543, 544 (Fla. 1992).

Surprisingly, the legislature declined to participate further in the reapportionment process: "We do hereby officially transmit to you our joint determination that we will not convene our respective houses in special session, or expand the scope of the current special session, to include legislative apportionment issues." Letter of the President of the Florida Senate and the Speaker of the Florida House to the Justices of the Florida Supreme Court dated June 18, 1992. App. 109. As a result, on June 25, 1992, the Florida Supreme Court itself modified the state plan to meet the Attorney General's objections to state Senate districts in Hillsborough County. In re Senate Joint Resolution 2G, 601 So. 2d 543 (Fla. 1992).

E. Federal Court Proceedings -- Section 2 Challenges To The Legislative Plan After Preclearance.

On April 6, 1992, pursuant to Fed. R. Civ. P. 53, the federal court had appointed a special master to review or prepare plans for reapportionment. On April 24, 1992, the special master appointed an expert to consider and evaluate the parties' congressional plans and began

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[14](...continued)
discriminatory intent or efect. 42 U.S.C. § 1973(c). Under federal law, Florida's 1990 apportionment was "not effective as law until and unless it is precleared." McCain v. Lybrand, 465 U.S. 236, 245 (1984).

hearings on them.[15] The evidence adduced at the hearings on congressional redistricting was extensive and largely concerned the Section 2 evidentiary issues involved in the "totality of the circumstances" test, specifically including south Florida.[16] Thus, even before the Florida Supreme Court entered its final decision on June 25, 1992, the federal court had before it all of the facts pertinent to a review of the parties' proposed plans or, if necessary, to prepare court-drawn congressional and state legislative apportionment plans.

On June 24, 1992, the Department of Justice filed a separate complaint challenging both the state House and state Senate plans under Section 2 of the Voting Rights Act. That action was consolidated with the third amended De Grandy complaint. On June 26, 1992, the same day that the Florida Supreme Court modified the Senate plan to meet the objections interposed by the Department of Justice and that plan became legally enforceable, the Appellees again moved to amend their complaint to add Section 2 challenges to the amended Senate plan. The court below permitted that amendment as well.

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[15] At this point, the court below had stayed proceedings regarding legislative reapportionment in deference to the legislative process.

[16] For an extensive discussion of the evidentiary basis upon which the special master concluded that minority congressional districts would be necessary, see De Grandy v. Wetherell, 794 F. Supp. 1076 (N.D. Fla. 1992). The findings of the special master and the court below with regard to the "totality of circumstances" elements in Dade County were subsequently buttressed in Meek v. Metropolitan Dade County, Fla., 805 F. Supp. 958 (S.D. Fla. 1992), and Meek v. Metropolitan Dade County, Fla., 805 F. Supp. 967 (S.D. Fla. 1992). All of these findings were later incorporated by the district court in its consideration of the state plan. App. 64.

F. The Section 2 Trial.

The three-judge court below divided the trial of the Section 2 challenge to the state legislative plan into a liability phase followed by a remedial phase. After five days of trial, the lower court determined that the Appellees had met all three of the Gingles preconditions,[17] as well as the totality of the circumstances test outlined by the concurrence in Gingles, thereby establishing Section 2 liability.[18]

In reaching its decision that the Hispanic community in the Dade County area was sufficiently large to comprise a tenth and an eleventh state House district, the court carefully examined the testimony of numerous experts regarding the percentage of voting age population necessary for Hispanics to have an equal opportunity to elect candidates of their choice. App. 38. The court also examined the available evidence to locate within Dade County the residences of recent immigrants. App. 46. Based on this

[17] The only Gingles precondition challenged by the House Appellants here is whether the De Grandy Appellees proved that the Hispanic population group is sufficiently large to constitute a majority in two additional single-member state House districts. In addition, House Appellants do not contest the lower court's findings with regards to the "totality of the circumstances." See n.2, supra, and accompanying text.

[18] In Solomon v. Liberty County, Florida, 899 F.2d 1012 (11th Cir. 1990) (en banc) (per curiam), cert. denied, 498 U.S. 1023 (1991), the Eleventh Circuit Court of Appeals divided evenly on the issue of whether Section 2 plaintiffs must make a showing beyond the three Gingles factors to establish liability. In the present case, the court below examined the "totality of the circumstances" in addition to the Gingles factors and concluded that, under either analysis, the Appellees had met their burden of establishing liability.

testimony and its own examination of the evidence,[19] the court concluded that, if a 60 percent Hispanic VAP guideline was applied carefully to localized demographic areas, this concentration would compensate for lower citizenship levels, as well as lower voter turnout and registration levels, and would thereby provide an equal opportunity for Hispanic citizens to elect candidates of their choice.[20] App. 84.

SUMMARY OF ARGUMENT

I. The De Grandy Appellees brought this Section 2 action on behalf of the Florida Hispanic community to remedy their historic lack of equal access to the political process in state legislative elections. Political competition in Florida in which the Hispanic community had supported candidates had been marred by campaigns characterized by racial appeals, historic underrepresentation in the state legislature and a severely racially polarized electorate. In this milieu of ethnic hostility, the De Grandy Appellees sought to achieve "fair group representation" for Hispanics in the state legislature.

Faithfully applying the well-recognized Gingles analysis, which this Court recently deemed applicable in the context of single-member districts, the district court found that the De Grandy Appellees had established that the Hispanic community was sufficiently large and geographi-

[19] The evidence adduced at the congressional portion of the trial was adopted by the lower court during its consideration of the House and Senate challenges. See n.16, supra, and accompanying text. See also App. 64.

[20] See also Judge Vinson's concurring opinion criticizing the unreliability of House Appellants' citizenship analysis data. App. 90-91.

cally compact to comprise eleven districts in which it could command a potential voting majority and elect candidates of its choice, rather than the nine Hispanic districts created by the state's plan.

II. The remedial plan adopted by the District Court contains only eleven Hispanic seats out of the 120-member House, less than ten percent of the entire Florida House of Representatives. In the state as a whole, Hispanics constitute 11.73 percent of the voting age population (a proportional allocation, if appropriate, would entitle Hispanics to 14 seats [120 x .1173 = 14.076]). Notwithstanding this lack of proportionality, the House Appellants cast as the central issue in this appeal as "whether as a result of its population size and geographic concentration, an ethnic minority can claim an entitlement under Section 2 of the Voting Rights Act to elect representatives in numbers greater than the minority group's percentage of the population." Even if proportionality afforded a per se defense in a Section 2 case -- a concept vigorously challenged here -- the remedial plan adopted falls well short of any such proportionality.

The district court properly evaluated the "effectiveness" of the De Grandy Appellees' proposed plan. By considering varying levels of voter registration, voter turnout, voting age population, election results, and citizenship, it concluded that the state's plan violated Section 2. In contrast, the district court found that the eleven districts proposed by the De Grandy Appellees afforded the required "potential" for the Hispanic community to elect representatives of choice and were, therefore, "effective."

The House Appellants continue to maintain the appropriateness of the state plan's creation of nine Hispanic districts "packed" with excessively high Hispanic citizen-

ship levels. Such an allocation of seats would be a departure from the state's policy of dividing legislative districts on the basis of all persons. The Hispanic non-citizens thereby excluded from Hispanic majority districts would necessarily be placed in Anglo districts, resulting in the disparate treatment of those non-citizens and, because only citizens may vote, unfairly weighting the votes of Anglo citizens.

III. Following the five-day trial, which itself was supplemented by earlier testimony in the congressional trial, the district court found Section 2 liability and, with elections imminent, moved immediately to the remedy phase. The House Appellants were afforded an opportunity to offer a remedial plan, in spite of the fact that the Governor and the Florida legislature had previously declined to consider reapportionment legislation further. The House Appellants consecutively presented two remedial plans that the district court found inadequate to cure the Section 2 violations. As a result, the court ordered the De Grandy Appellees' modified plan into effect.

IV. Finally, the House Appellants continue to insist that the district court should not have entertained the De Grandy Appellees' Section 2 claims at all, because the state supreme court -- pursuant to state constitutional mandate -- had declared the state's plan valid on its face, despite the fact that no evidence was presented, no cross-examination was allowed and there were no findings of fact. That argument, however, is premised upon a confrontation between a federal court and a state court that never occurred. The Florida Supreme Court expressly declined to adjudicate any Section 2 claims during the state proceeding. The federal court, therefore, properly undertook that task.

For the reasons stated herein, the judgment of the lower court with respect to the Florida House of Representatives should be affirmed in all respects.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT THE STATE PLAN IMPROPERLY DILUTED HISPANIC VOTING STRENGTH AND DENIED MEMBERS OF THAT COMMUNITY EQUAL PARTICIPATION IN THE ELECTORAL PROCESS AND THE OPPORTUNITY TO ELECT REPRESENTATIVES OF THEIR CHOICE.

A. In Establishing Liability, The District Court Faithfully Applied This Court's Standards For Determining Vote Dilution.

A Section 2 violation is established if plaintiffs can show that "the political process leading to nomination or election in the state are not equally open to participation by a class of citizens protected [by the Act] in that its members have less opportunity to participate in the electoral process and elect representatives of their choice." 42 U.S.C. § 1973(b). In Thornburg v. Gingles, 478 U.S. 30 (1986), a vote dilution case challenging multi-member districts, this Court defined the order and method of proving whether members of a protected class have "less opportunity to participate in the electoral process."[21] The

[21] In Gingles, this Court announced three preconditions by which minority plaintiffs establish a prima facie case of unequal opportunity to participate in the political process. These preconditions require that the minority must be able to demonstrate:

(continued...)

true thrust of House Appellants' position in this case is that the Gingles precondition analysis does not apply to a case challenging single-member districts. House Appellants' Brief at 23-24. In fact, however, this Court's recent unanimous opinions in Voinovich v. Quilter, ___ U.S. ___, 113 S. Ct. 1149, 1157 (1993) and Growe v. Emison, ___ U.S. ___, 113 S. Ct. 1075, 1084 (1993), held that "the Gingles preconditions apply in challenges to single-member districts as well as multimember districts."

Here the court below found that: Hispanics are sufficiently large and geographically compact to form a majority in two more districts than were created in the state's plan, App. 36-53[22]; Hispanics are politically cohesive, App. 53-58, and non-Hispanics usually vote sufficiently as a bloc to defeat the Hispanic community's choice except when the candidate of choice runs in a district in which Hispanics are a voting majority, App. at 59-64.

[21](...continued)

1) that it is sufficiently large and geographically compact to constitute a majority in a single-member district;

2) that it is politically cohesive; and

3) that the white majority votes sufficiently as a bloc to enable it -- in the absence of special circumstances, such as the minority candidate running unopposed -- usually to defeat the minority's preferred candidate.

Gingles, 478 U.S. at 49-50.

[22] As Justice Brennan explained in Gingles: "Unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U.S. at 50, n.17 (emphasis in origina.,.

In particular, the district court found that the De Grandy Appellees had met the Gingles threshold test by introducing an alternative districting plan in which the Hispanic population by its proxy, the Hispanic voting age population -- comprised appropriate and effective majorities in eleven single-member districts in Dade County. App. 82-83. Based upon reconstituted results of numerous previous Anglo-Hispanic elections in the precincts which comprised the eleven illustrative districts, the court also found these districts to be effective in that the Hispanic community's candidate of choice would have prevailed had the districts been in effect. See Testimony of Dr. Allan J. Lichtman, Tr. III, 24.

In further examining the State of Florida and Dade County, the court found that the lingering effects of social and economic discrimination "profoundly divided" Hispanic and Anglo racial groups, App. 61, and specifically found the existence of continuing discrimination against Hispanics. App. 64-65. Thus, the court completed its finding of ultimate vote dilution based not only upon the Gingles factors but also upon language-based discrimination and the lingering effects of social, economic and political discrimination in the state of Florida. App. 64-67. In fact, Dr. Dario V. Moreno testified that SJR 2-G "is designed to elect non-Hispanic whites by exploiting ethnic tensions and polarizing voting patterns in Dade." J.A. 195. As a result, the district court properly determined that the state plan impermissibly denied the Hispanic community an equal opportunity to participate in the electoral process. App. 66-67. These findings of ultimate vote dilution are binding on appellate courts unless clearly erroneous. Anderson v. Bessemer City, 470 U.S. 564 (1985).

Voinovich recently affirmed this very method of determining whether minority voters possess the potential to elect additional representatives of choice. That case

involved a challenge to the single-member legislative reapportionment scheme in the state of Ohio on the grounds that it unnecessarily overconcentrated, or "packed," African-Americans into majority districts, which limited their voting potential or influence in surrounding legislative districts. Although this Court could not find that a protected class had been denied equal opportunity in that case, that result obtained only because the Ohio plaintiffs could not point to additional single-member districts in which they had the potential to comprise a majority, not because the Gingles analysis was inappropriate to apply in the single-member district context.

Such was not the case here. While the De Grandy Appellees' fracturing claim is conceptually similar to that of the Voinovich plaintiffs (in that both involve vote dilution challenges to single-member districting plans), unlike Voinovich, in this case the De Grandy Appellees offered an alternative plan which created two additional districts in which the Hispanic minority would have the effective ability to elect candidates of its choice. App. 87. This potential to elect additional candidates of choice, when combined with the clear demonstration of a "totality of circumstances" of invidious discrimination, conclusively demonstrates that the De Grandy Appellees' rights to equal participation and equal opportunity were impaired by the state plan.

B. Appellants' Proportional Representation Defense Is Not Supported By Section 2, By This Court's Decisions Or By The Facts Of This Case.

1. The District Court's Finding Of Vote Dilution Negated Any Defense Of Proportional Representation Or Maximization.

In amending Section 2, Congress did not directly address the measurement of "how many" districts a minority group should have to achieve "equal opportunity." The language of Section 2, standing alone, only mandates that the district court engage in a fact-intensive examination of a challenged districting plan and determine, based on the "totality of circumstances", whether a violation has occurred. This statutory test grants to district courts wide discretion in evaluating vote dilution claims. To channel this discretion, this Court adopted the three Gingles preconditions, which effectively restrict the application of Section 2 to circumstances in which a minority group's "fair group representation" has actually been impaired. See Davis v. Bandemer, 478 U.S. 109, 125 n.9 (1986).

Even if proportionality had been achieved in this case, which it has not, the language of the statute with regard to proportionality does not create a irrefutable presumption for either plaintiffs or defendants. With regard to plaintiffs, Section 2 cautions that "nothing in this Section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." This proviso is a limitation on a plaintiff's ability to make out a prima facie case and prevents race-based districting without additional proof of "unequal opportunity" in the election process. With regard to

defendants, Section 2 provides that "the extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered." (Emphasis added.) Because proportionality is, thus, but one of the factual circumstances, the trial court's finding in that regard is binding unless clearly erroneous.

Indeed, Justice Brennan, discussing the effect of this proviso, analyzed the legislative history of this part of the statute and concluded that "proof that some minority candidates have been elected does not foreclose a Section 2 claim." 478 U.S. at 75. See also Baird v. Consolidated City of Indianapolis, 976 F.2d 357, 359 (7th Cir. 1992). As Judge Easterbrook wrote for the Baird court:

> We agree . . . that proportional representation does not automatically defeat claims under the Voting Rights Act -- not only because Justice Brennan's opinion says so, 478 U.S. at 74-76 . . . , but also because the statute gives to each person the right to political participation. . . . A balanced bottom line does not foreclose proof of discrimination along the way. Connecticut v. Teal, 457 U.S. 440 . . . . Just as the proviso . . . ensures that white candidates are free to compete for electoral success that exceeds the ratio of white voters, so blacks must be free to compete for favor; the Voting Rights Act neither sets nor tolerates a cap on their achievements.

Id. (emphasis added).

Justice O'Connor's concurring opinion in Gingles illustrates that this Court clearly understood the conse-

quences that the adoption of this measurement of equal opportunity has for district courts reviewing reapportion-
.. plans.

> The Court's definition of the elements of a vote dilution claim is simple and invariable: a court should calculate minority voting strength by assuming that the minority group is concentrated in a single-member district in which it constitutes a voting majority. Where the minority group is not large enough, geographically concentrated enough, or politically cohesive enough for this to be possible, the minority group's claim fails. Where the minority group meets these requirements, the representatives that it could elect in the hypothetical district or districts in which it constitutes a majority will serve as the measure of its undiluted voting strength. Whatever plan the State actually adopts must be assessed in terms of the effect it has on this undiluted voting strength.

478 U.S. at 91. What might have been controversial in Gingles is now settled law. Because this Court unanimously applied the Gingles test as a threshold requirement in Voinovich and did not limit that approach by any consideration of proportionality as a per se defense, that case stands as an effective prediction of the proper disposition of that issue when it is appropriately presented.

Thus, the House Appellants' reliance upon the result of this Court's analysis of District 23 in Gingles is entirely misplaced. This Court's holding with regard to District 23 is only that the plaintiffs there, like the plaintiffs in Voinovich, were unable to prove that an additional majority/minority district could be created in excess of the number of blacks who had historically been consistently elected. "This persistent proportional representation is inconsistent with appellees' allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority." 487 U.S. 77. As Justice Brennan specifically warned, however, "[i]n some situations, it may be possible for Section 2 plaintiffs to demonstrate that such sustained success does not accurately reflect the minority group's ability to elect its preferred representatives. . . ." Id. In the instant case, not only was there no history of "sustained [Hispanic] success," but also there was unrebutted proof that the Hispanic minority's undiluted voting strength exceeded that provided for it by the state plan.

The House Appellants further rely upon Nash v. Blunt, 797 F. Supp. 1488 (W.D. Mo. 1992), aff'd sub nom. African-American Voting Rights Legal Defense Fund, Inc. v. Blunt, 61 U.S.L.W. 3682 (April 5, 1993), to support their proportionality defense. That case arose in a factual setting clearly distinguishable from the case at bar.[23] Unlike the historical experience in Florida, the Nash court found evidence of a history of proportional representation, as well as a near certain likelihood that there would be such representation in the future. In this case, the undisputed proof is that the 1992 elections confirmed, and the experts' predict that future election results in Florida will confirm, underrepresentation of the Hispanic community because of the illegal "packing" achieved by the state plan.

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[23] The De Grandy Appellees recognize that this Court summarily affirmed Nash. As was observed in Davis v. Bandemer, however, summary affirmances are not binding on this Court in a subsequent plenary consideration of another case. 478 U.S. 109 at 121.

Put another way, the effect of the Gingles standard, properly applied, is illustrated by a mathematical application of the concept of proportionality to the facts in this case. True proportionality would entitle Hispanics to 14 seats in the Florida House.[24] The creation of eleven Hispanic seats in the plan adopted by the court neither grants Hispanics proportional representation nor maximizes their voting strength. Because, as a factual matter, neither the state's plan nor the district court's remedy achieves proportionality, this Court does not need address to address whether, under a proper factual setting, a proportionality defense exists to a Section 2 claim.

2. The State As A Whole Is The Correct Geographic Area In Which A Court Should Measure Vote Dilution.

House Appellants argue that proportional representation of Hispanics in Dade County defeats a Section 2 challenge to the state House apportionment scheme for the entire state of Florida. Even if the Court were to accept proportionality as a per se defense, which the Appellees do not believe it should, such a defense must be examined on the basis of the statewide plan. The De Grandy Appellees have consistently contended that the House districts for the entire state established by the state plan deprived Hispanics of an equal opportunity to elect candidates of their choice.

For example, paragraph 133 of the fourth amended complaint alleged that the

[24] Because Florida Hispanics comprise 11.73 percent of the statewide voting age population, under a strictly proportional system, they would be entitled to 14 of the 120 House seats.

> ethnic population concentrations of the State of Florida are such that, if the state is divided into equally populated districts which respect communities of interest and follow other non-discriminatory plan drawing criteria, there exists, as a minimum . . . eleven districts which would contain a majority of Hispanic voting age population. These are also politically cohesive and reasonably compact districts.

J.A. 67. That all eleven of these districts are found in the Dade County area does not establish that the De Grandy Appellees were not challenging the entire discriminatory state plan. When counsel stated on the record that the evidence of vote dilution would be presented only with regard to Dade County, they were not abandoning the challenge to the statewide plan. Indeed, the De Grandy Appellees' proof was necessarily limited to the south Florida area where compact Hispanic majority districts could be created. The House Appellants much-vaunted record statements are nothing more than a confirmation of the De Grandy Appellees' consistent contention -- Hispanics in the Dade County area have been submerged by limiting their election of representatives of choice.[25]

The notion that a federal court should use a local political subdivision to measure voting power in a statewide

[25] African-American plaintiffs may have been able to show majority/minority districts in certain other areas of the state where claims were originally alleged. Their abandonment of these claims has no impact on the simple fact that the De Grandy Appellees never strayed from their original contentions that Hispanic vote dilution existed in the State of Florida as a result of the "packing" of Hispanics into nine (rather than eleven properly constituted districts) in the Dade County area.

legislative body that uses single-member districts has been discarded since Gray v. Sanders, 372 U.S. 368 (1963). Proportionality, when it is considered as a part of the totality of the circumstances, should be measured on the basis of the entire population of the governmental unit in question. As City of Richmond v. United States, 422 U.S. 358 (1975), illustrates, proportionality for a municipality is measured on the basis of the population of the area served by that government. Likewise, Baird undertook a proportionality analysis based on the entire jurisdiction challenged, not a lesser political subdivision. See also Jeffers v. Clinton, 730 F. Supp. 196 (1989), aff'd, 498 U.S. 1019 (1991) (measuring vote dilution in a statewide legislative plan on the basis of total statewide population).[26]

If a legislature can selectively pick the subdivision it chooses to measure proportionality, it can guarantee that no dilution claim can ever be proven. If just one member of the minority group has historically been elected (or his election can reasonably be predicted), the state could thereby define an area in its plan in which proportionality

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[26] As the Jeffers court found:

> For the foreseeable future, the present location of legislative districts lines will make it very difficult to elect more than six black legislators, out of a total in both houses of 135 members. And this is so even though black people make up about 16 percent of the total population of the State of Arkansas.
>
> In this situation, black citizens have less opportunity than other members of the electorate to elect representatives of their choice. This is a violation of Section 2(b) of the Voting Rights Act, 42 U.S.C. § 1973(b).

730 F. Supp. at 198.

had been achieved. Such an ultimately malleable standard would leave courts rudderless as to what geographic area to use in evaluating compliance.

The House Appellants provide no persuasive authority for their assertion that a proportionality analysis should be confined to the geographic area where the minority population is sufficiently concentrated to draw majority/minority districts. By citing Brown v. Thomson, 462 U.S. 835 (1983), for the proposition that the focus of the inquiry must be on Dade County alone, the House Appellants ignore both the legal and factual distinctions of that case. Brown was not a Section 2 case; it concerned an equal protection claim that specifically alleged only that one county in the state of Wyoming was overrepresented. As a result, this Court noted that, "Appellants deliberately have limited their challenge to the alleged dilution of their voting power resulting from the one representative given to Niobrara County." Id. at 846. In contrast, here, the De Grandy Appellees and the United States both complained of the dilutive effects of the statewide apportionment scheme embodied in SJR 2-G. J.A. 67, 77. The Appellees' use of evidence of Hispanic vote dilution in "south Florida" to illustrate and prove the flawed nature of SJR 2-G did not convert their statewide dilution claims to claims based on the Dade County area alone.

C. The Court Below Applied The Correct Standard For Measuring Voting Strength Needed To Create Districts Complying With Section 2.

1. Use Of Citizen Voting Age Population Would Lead To Constitutionally Impermissible Results.

When devising new legislative districts,[27] it is elementary that a state must create them in such a way as to ensure that each person's vote is weighted "as nearly equal as practicable." Reynolds v. Sims, 377 U.S. 533, 577 (1964). In achieving this requirement, a state may choose, as a matter of its internal policy, a standard method to apply consistently throughout its jurisdiction to create equal population districts. As a result, districts may be comprised of equal numbers of all persons reported by the federal census or, alternatively, this Court has approved the use other criteria, including the number of registered voters (Burns v. Richardson, 384 U.S. 73 (1966)), or citizens (WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964)), so long as the alternative method chosen is an acceptable proxy for achieving districts of roughly equal total population.

The State of Florida chose, as a matter of state policy, to draw its House districts by dividing the total number of all persons in the state into 120 districts of approximately equal total population. The base number used was the total population of the state as reported in the 1990 federal census. This measure includes all persons --

[27] Article III, § 16 of the Florida Constitution requires that Florida's bicameral legislature be reapportioned every ten years on the basis of the federal decennial census and permits a configuration of either single or multi-member districts.

all citizens, all non-citizens, all voters and all non-voters.[28] This policy choice is reflected in the Florida constitution as well as in the actual numerical division of the districts contained in SJR 2-G. See Plaintiffs' Exh. 5 (Report Accompanying SJR 2-G) (Data for Districts), House Appellants' Juris. Statement App. 171a et seq.; see also In re Senate Joint Resolution 2G, 597 So. 2d 276, 278-79 (Fla. 1992).

By pursuing a defense that insists upon structuring districts according to the citizen voting age population ("CVAP") only, the House Appellants have drastically departed from their own state policy and, if successful, would impose an invidiously discriminatory burden upon the Hispanic community of south Florida. This departure from established procedure would itself be evidence of intentional discrimination. Village of Arlington Heights v. Metro Housing Development, 429 U.S. 252, 267 (1977). The resulting Hispanic districts would be "packed" with high citizenship levels in order to achieve the state's criteria. Neighboring Anglo districts would have higher numbers of non-citizens and, correspondingly, a lower number of voters.

Because only citizens can vote, the policy chosen by the State of Florida of including all persons (citizens and non-citizens, voters and non-voters) in equal population districts may well result in there being fewer eligible voters in districts that are populated by significant numbers of

[28] Non-citizens are both counted in the federal census and included in the congressional apportionment base. See Federation for American Immigration Reform v. Klutznick, 486 F. Supp. 564, 576-577 (D.D.C. 1980).

non-voters and/or non-citizens.[29] Because representatives elected from those districts represent the people of those districts,[30] such a disparity in the number of eligible voters does not violate the requirements of Reynolds v. Sims.

An essential underpinning of the validity of a redistricting plan is that the method of dividing the state -- the population base chosen by which to establish the requisite number of districts -- must be consistently applied. Swann v. Adams, 385 U.S. 440 (1967). Because the number of citizens in a state is a subset of the state's total population, and because the number of registered voters is, likewise, a subset of the total number of citizens, a redistricting scheme that uses more than one population

[29] As one district court explained:

> State districts drawn strictly on the basis of population would clearly be constitutional, Reynolds v. Sims, 377 U.S. 533, 567 (1964), in spite of the fact that concentrations of non-voting residents in a few districts (such as where prisons or orphanages are located) would make the ballots of voters in those districts more "valuable" than voters' ballots in other districts.

Federation for American Immigration Reform v. Klutznick, 486 F. Supp. 564, 577 n.16 (D.D.C. 1980). Indeed, if the state chooses to exclude some persons on the basis of citizenship, then it must also exclude other groups of ineligible voters such as residents who vote in other states, military personnel who vote in other states and prisoners.

[30] As the Ninth Circuit Court of Appeals has recognized, "The purpose of redistricting is not only to protect the voting power of citizens; a coequal goal is to ensure 'equal representation for equal numbers of people.'" Garza v. County of Los Angeles, 918 F.2d 763, 775 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991), citing Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969).

base would necessarily produce disparately populated districts.

Even if CVAP were, theoretically, an appropriate methodological base, the state's evidence in the court below was fatally flawed. As Judge Vinson's concurring opinion explained:

> The defendants have attempted to show that it is the citizen Hispanic voting age population that is determinative. That Hispanic citizenship data is not available, however. Despite the lack of available data, the defendants presented estimates of Hispanic citizenship and attempted to apply them to the individual districts. Those estimates are unreliable. For example, William De Grove's analysis was based on a somewhat unorthodox regression analysis methodology that gave a range of non-citizenship rates of 9.5% for precincts with no Hispanics to 55% for precincts with 100% Hispanic voters. (Acknowledging, of course, that there is no such precinct.) He recognized that the error in that analysis was greatest at the extremes, i.e., at the 9.5% and 55% intercepts. Nevertheless, he used the 55% as the basis of all his citizenship calculations. Plainly, his estimated Hispanic citizenship ratios for the eleven districts must be viewed with low confidence and with a large range of error.

A better gauge of eligible voters within a district is the analysis of the last election results. Those statistics established that Hispanics would be able to elect His-

> panic candidates of choice in all eleven districts proposed by plaintiffs, and those statistics automatically account for voter citizenship, registration, and turn out. Thus, in the absence of any better data, the plaintiffs' evidence is sufficient.

App. 90-91. This finding that the House Appellants had failed in the proof of the very bases of their argument here is binding on appeal.

Adopting the position now advanced by the House Appellants would also result in a logical and legal anomaly. The only means of achieving districts with markedly high percentages of Hispanic citizens -- such as the ones House Appellants suggest -- while maintaining the constitutionally required equal population of all districts, would be to exclude Hispanic non-citizens from such districts. The Hispanic non-citizens thereby excluded would necessarily be placed into non-Hispanic districts. Under this approach, the resulting Hispanic-controlled districts would either be held to a standard requiring a high citizenship percentage and the non-Hispanic districts would be held to no citizenship standard, or would be impermissibly disparate in population. As explained above, in districts composed of equal numbers of all persons, packing of non-voters into majority districts would serve to reduce the number of voters needed to control those districts and would debase the value of the high citizenship districts accordingly.[31]

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[31] Two hypothetical districts illustrate this point:

District	Citizen Pop.	Non-Citizen Pop.	Total
A	75,000	25,000	100,000
B	100,000	0	100,000

(continued...)

Moreover, the opportunity for Hispanic non-citizens residing in predominately Anglo or African-American districts to be represented by Hispanic legislators would be limited or destroyed under the state's plan, as opposed to being preserved in the court-imposed remedy.

Such a result would violate the Fourteenth Amendment. Although non-citizens cannot vote, they are nevertheless entitled to participate in other aspects of the political process. "Non-citizens are entitled to various federal and local benefits . . . . As such, they have a right to petition their government for services and to influence how their tax dollars are spent." Garza v. County of Los Angeles, 918 F.2d 763, 775 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991). As early as 1886, this Court held that aliens are "persons" within the meaning of the Fourteenth Amendment and are thus protected from discriminatory state action by the Equal Protection Clause. Yick Wo v. Hopkins, 118 U.S. 356 (1886). That holding has been reaffirmed many times since and is no longer open to dispute. See, e.g., In re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971). This Court should not recognize in this case a method of apportionment that would inexorably lead to disparate treatment of non-citizens.

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[31](...continued)

In this situation, if all citizens can vote, 37,501 voters can control the outcome of elections in District A. By contrast, 50,001 voters would be the controlling majority in District B. The ballots of voters in District A would thus be more "valuable" than those in District B. While Reynolds and its progeny, Klutznick, teach that this result is constitutional when applied uniformly, it is not constitutional when applied discriminatorily, as in this case.

2. The Court Below Correctly Measured Vote Dilution.

The De Grandy Appellees attacked the Dade County area districts in the House plan as violative of Section 2, alleging:

> Hispanic voters are packed in Districts 110 (82.1%), 111 (75.7%), and 114 (77.5%) and [the state's plan] further submerges Hispanic voters in black minority districts, specifically, District 103 (62% black, 27.8% Hispanic), District 109 (63.0% black, 34.5% Hispanic), and District 118 (34.5% black, 27.1% Hispanic). Less egregious examples of packing, but still having the same dilutionary effect, are District 104 (57.8% black, 16.1% Hispanic), Anglo District 105 (19.2% Hispanic), Anglo District 106 (32.3% Hispanic), District 108 (66.2% black, 16.0% Hispanic). SJR 2-G appears to purposefully pack, fracture and submerge the Hispanic population deliberately to dilute Hispanic voting strength;
>
> Nine Hispanic-American majority districts were created in SJR 2-G; however, other plans submitted to the Legislature show that eleven majority-Hispanic-American seats can be created in the Dade County area. This dilution of Hispanic voting strength is accomplished by the aforementioned packing, fracturing, and submergence with the intent and purpose of protecting white incumbents . . . .

App. 25-26.

The lower court evaluated these allegations with a careful adherence to the analytical framework established by Gingles. The district court considered the three "preconditions" to measure impairment of minority voters' ability to elect representatives of their choice and also assessed the objective factors listed in the Senate Report accompanying the 1982 amendments to Section 2.[32]

With regard to the first Gingles precondition (sufficiently large and geographically compact), the court below noted that voting age population -- not total population -- is the best measure of opportunity within a district to elect candidates of choice. App. 37. Further, the court noted that a "supermajority" of voting age population is necessary to account for the presumably larger number of non-citizens within the minority population as well as the lower levels of voting age persons, voter registration and voter turnout. App. 38.

In this regard, in contrast to the contention of the House Appellants, the lower court did not ignore citizenship levels or blindly follow the so-called "65% rule" to determine the appropriate supermajority needed to satisfy the "sufficiently large" requirement.[33] Based upon Dr.

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[32] See n.21, supra, and accompanying text.

[33] The district court's opinion explained the origin and use of the so-called 65 percent rule.

> The 65 percent rule states that "barring exceptional circumstances, a district should contain a black [or Hispanic] population of at least 65 per cent (or a voting age population of at least 60 percent) to provide blacks [or Hispanics] with an opportunity to elect a candidate of their choice. . . ." The origin of this rule has been traced to the United States Supreme

(continued...)

Lichtman's expert analysis that "no candidate of choice of the Hispanic [community] . . . has been elected in districts below a 59 percent Hispanic [voting age population] level, and in districts at 59 percent and above, those districts have in every instance elected Hispanic candidates," App. 44, the district court reasoned:

> Specifically, the 65 percent rule is premised on the fact that many Hispanics are non-citizens and have lower voter registration and turnouts. If this were not the case, there would be no reason to create districts containing more than 50.1% Hispanic VAP. No one disagrees that because of the lower citizenship and registration/turnout rates, Hispanic districts must contain a super-majority of Hispanic VAP. As previously stated, the 65 percent rule was "arbitrarily" created to account for these problems. Thus, this court must either (1) accept or modify the 65 percent rule or (2) formulate its own methodology for estimating the number of non-citizens reflected in the Hispanic VAP for the various districts. Because each of the districts contains a 60% Hispanic VAP and, therefore, "satisfies" the 65 percent rule, the court need not further inquire as to the Hispanic citizenship levels in each proposed district.

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[33](...continued)
Court case of United Jewish Organizations, Inc. v. Carey, 430 U.S. 144, 97 S. Ct. 996 (1977) and has been subsequently addressed in Ketchum and Neal v. Coleburn, 689 F. Supp. 1426 (E.D. Va. 1988).

App. 39.

App. 48-49 n.29. Accordingly, the House Appellants are incorrect in asserting that the court's findings were clearly erroneous.

The House Appellants cite Romero v. City of Pomona, 883 F.2d 1418 (9th Cir. 1989), and McNeil v. Springfield Park Dist., 851 F.2d 937 (7th Cir. 1988), cert. denied, 490 U.S. 1031 (1989), in support of the proposition that "the voting strength of the plaintiff must be assessed on the basis of its citizenship levels." House Appellants' Brief at 39. Neither Romero nor McNeil offer authority for narrowly restricting the threshold examination of minority voting potential to minority citizens only. As noted in both Romero and McNeil, the purpose of the initial Gingles requirement is to determine whether the minority group has the potential to elect a candidate of its choice in a single-member district. It was in this context that the lower court here used voting age population and election statistics that took into account citizenship levels.

II. THE REMEDIAL PROCEDURE FOLLOWED BY THE DISTRICT COURT WAS CONSISTENT WITH THE EQUITABLE STANDARDS ESTABLISHED BY THIS COURT.

After finding a Section 2 violation, the court below followed this Court's remedial procedure for reapportionment of the state House. The remedial duty a court faces upon making a finding of Section 2 liability is, foremost, to "exercise its traditional equitable powers to fashion relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 417, 97th Cong. 2d Sess. 31 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 208. In fashioning its remedy, the court "has not

merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965). A court cannot "authorize an element of an election proposal that will not with certitude completely remedy the Section 2 violation." Dillard v. Crenshaw County, 831 F.2d 246, 252 (11th Cir. 1987) (emphasis in original).

The appropriate standard for court remedial action requires courts to defer to state legislatures in redrawing plans, where practical. Wise v. Lipscomb, 437 U.S. 535, 540 (1978). When, however, "those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation' . . . of the federal court to devise and impose a plan pending later legislative action." Id. at 540.

In the instant case, the legislature was manifestly unable to pass a reapportionment plan during its regular session. The reapportionment plan passed in the special session was approved by the state Senate by a margin of only one vote, an event which foreshadows the legislature's later unwillingness to draw additional districting plans. Indeed, both the House Appellants and the Senate appellees wrote to the Florida Supreme Court indicating their unwillingness to consider legislative apportionment further. App. 109.[34] By the time the lower court made its finding of liability, filing for the 1992 elections was less than two weeks away. Notwithstanding the late hour, the court nevertheless granted the House Appellants an opportunity to devise remedial plans during the remedial phase of the trial. The House Appellants' response was to submit two

[34] The pertinent part of the letter is quoted at p. 12, supra.

remedial plans that the district court specifically determined did not fully remedy the violations it had found.[35] App. 84-85.

An important colloquy took place between Judge Stafford and Mr. Wallace, Chairman of the Reapportionment Committee of the Florida House of Representatives, when the House Appellants offered their second remedial plan:

> JUDGE STAFFORD: We have been in here slugging it out for three days on that point and then you come in at 6:30 and tell us you have one with eleven seats and enhance the black seats; is that correct?
>
> MR. WALLACE: Well, Your Honor, we did feel an obligation to prepare for the remedial phase of this litigation. And that plan was prepared in anticipation of that.
>
> JUDGE STAFFORD: So, it is doable; is that what you're saying, Mr. Wallace?
>
> MR. WALLACE: Within the parameters --
>
> MR. PETERS: But we need --
>
> JUDGE STAFFORD: You asked for him to speak. I'm talking to him.

[35] The district court concluded that, because the House Appellants' plans did not sufficiently take new Hispanic arrivals into account, they "[did] not give Hispanics a reasonable opportunity to elect candidates of their choice." App. 85.

MR. WALLACE: I'm happy to answer the question.

JUDGE STAFFORD: You are the Chairman of this committee and had that responsibility for how many months now?

MR. WALLACE: Your Honor, I have been Chairman of this committee since just after the 1988 election.

JUDGE STAFFORD: All right. So, you tell us now: You are representing to this Court that you can create in Dade County eleven Hispanic seats and increase the electability of black candidates in Dade County within the confines of the Joint Resolution without affecting any other district? Is that your representation before this Court?

MR. WALLACE: Your Honor, that plan contains eleven Hispanic districts. The lowest voting age population in the Hispanic districts is 61 percent. It contains four black districts 55 percent black voting age population and higher. I'm not really prepared to testify about the specifics of the districts. And I will tell you, Your Honor, that that plan was, you know, that plan has just been completed. It's not like it's been sitting around here on the doorstep somewhere.

JUDGE STAFFORD: No, I understand that. But it is now created?

MR. WALLACE: Yes, sir. . . .

Tr. VIII, 112-13. Thus, by demonstrating that one or two additional Hispanic districts could be created, the proffered House plans effectively contradict the House Appellants' current contention that only nine effective districts can be created.

In sharp contrast to the total absence of remedial considerations with respect to the state Senate, the House Appellants were afforded a remedy phase. Having offered two proposed remedies that did not fully cure the Section 2 violations found by the district court, the House Appellants now merely seek another opportunity to litigate the remedy phase.

III. THE ABSTENTION DOCTRINE HAS NO APPLICATION WHERE PLAINTIFFS SEEK REDRESS FOR VIOLATION OF A FEDERAL STATUTE IN FEDERAL COURT AND NO STATE COURT HAS EVER ADJUDICATED THE CLAIM.

Throughout this case, both prior to the judgment of the district court[36] and in this appeal, the House Appellants have persistently -- and incorrectly -- asserted that the De Grandy Appellees were not even entitled to a federal court hearing of their Section 2 claims. They maintain that "[t]hose plaintiffs had previously raised, and had received an adjudication of, identical Section 2 claims in the Florida Supreme Court." House Appellants' Brief at 20. Because the Florida Supreme Court explicitly declined to entertain or adjudicate Section 2 issues in connection with its facial review of the legislative reapportionment plan, no such issue of res judicata arises.

---

[36] See House Appellants' Application for Stay filed June 26, 1992.

In declaring SJR 2-G "facially valid," the Florida Supreme Court stated it did not, and could not, adjudicate whether the plan complied with Section 2:

> [I]t is impossible for us to conduct a complete factual analysis contemplated by the Voting Rights Act, as interpreted in Thornburg v. Gingles, within the time constraints of Article III, Section 16(c). . . .
>
> Any decision which requires consideration of facts that are unavailable in our analysis will have to be resolved in subsequent litigation. . .

In re Senate Joint Resolution 2G, 597 So. 2d 276, 282 (Fla. 1992). Because of the limitations of the Florida Supreme Court's review and the "unavailability of specific factual findings," the court's decision was entered without prejudice to a later Section 2 challenge. 597 So. 2d at 285. Because the Florida Supreme Court did not adjudicate any Section 2 claims, the federal district court does not have to give any, let alone full, faith and credit to a judgment that did not decide the issues before it. Haring v. Prosise, 462 U.S. 306, 313 (1983).

The House Appellants also stray from the facts in stating that the De Grandy Appellees were given "a full and fair opportunity to litigate" the Section 2 claims and that the state court received "evidentiary submissions." House Appellants' Brief 45. The opponents of SJR 2-G were strictly limited to the presentation of a single illustrative plan, a written brief and a truncated oral argument. The court did not permit one word of sworn testimony or a single question on cross-examination.

For the same reason, abstention under the Rooker-Feldman doctrine does not apply. The district court below was not reviewing an adjudication of Section 2 claims, but, rather, was deciding those issues for the first time. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

In fact, throughout the course of the federal proceedings, the district court afforded maximum deference to the state reapportionment process.[37] It was only after the State of Florida had a legally enforceable House plan, and Section 2 challenges were interposed against it, that the district court decided to exercise jurisdiction. At that point, there were no proceedings in state court concerning legislative redistricting, and the sole issue remaining was

---

[37] The House Appellants' accusation that the federal court failed to respect state authority over redistricting is totally unsupported by the record. Directly to the contrary, since the filing of the De Grandy Appellees' original complaint in January 1992, the district court has deferred to all state proceedings.

When the De Grandy Appellees initiated this action, the district court dismissed the complaint, ruling that the state legislature should have more time to pass an apportionment plan. Even when the district court reluctantly accepted jurisdiction in March, after the Florida legislature failed to pass a plan, the court was quick to point out that it was not enjoining any state proceeding. Thereafter, when the legislature passed a joint resolution of apportionment on April 10, 1992, the district court bifurcated its trial schedule, setting the trial on congressional redistricting first and delaying the trial on state redistricting. When the Florida Supreme Court entered its determination that the joint resolution was facially valid, the federal court, on its own motion, stayed all proceedings concerning state legislative redistricting. Finally, despite numerous requests by the De Grandy Appellees to lift the self-imposed stay and set trial during the preclearance review process, the federal court refused, deferring all action until the Department of Justice's preclearance decision. App. 14.

whether an existing, legally enforceable plan violated Section 2 of the Voting Rights Act. That federal issue was, for the first time, pending in a federal court and, at that point, the federal district court had not only the right, but the obligation, to entertain the De Grandy Appellees' federal claims.

As this Court stated in New Orleans Pub. Serv., Inc. v. New Orleans, 491 U.S. 350, 373 (1989):

> It is true that the federal court's disposition of such a case may well affect, or for practical purposes pre-empt, a future or, as in the present circumstances, even a pending state-court action. But there is no doctrine that the availability or even the pendency of a state judicial proceeding excludes the federal courts. Viewed as it should be, as no more than a state-court challenge to completed legislative action, the Louisiana suit comes within none of the exceptions that Younger and later cases have established.

If the Court were to adopt the theory put forward by the House Appellants under these facts -- that the mere presence of an alternative forum warrants abstention -- then a federal court would never be able to hear cases involving civil rights protected under the United States Constitution. In sum, the record in this case reflects that, even though it was not required to do so, at every stage of the proceedings, the federal court deferred to the state proceedings and stayed its hand hoping for a state resolution of proven violations of federal law.

The House Appellants' claim that the decision in California Democratic Congressional Delegation v. Eu, 790 F. Supp. 925 (N.D. Cal. 1992), is "identical" to this case,

House Appellants' Brief at 46[38]; however, the circumstances of that case quite clearly distinguish it from the case at bar. The California plaintiffs had filed their case with the California Supreme Court as permitted by the state constitution. Long before a case was filed in federal court, the California Supreme Court, through a special master, heard extensive evidence on the totality of the circumstances and had drawn a plan that was designed to meet any possible Voting Rights Act challenge. Wilson v. Eu, 823 P.2d 545 (Cal. 1992). By the time that the federal district court declined jurisdiction, the California Supreme Court had already produced maps and reached a final adjudication of the Voting Rights Act issue. If the district court there had exercised jurisdiction, it would have been in the position of an appellate court in violation of the Rooker-Feldman doctrine. No such circumstances existed here, because the Florida Supreme Court had expressly declined to adjudicate the Section 2 issues.

Finally, federal courts do not abstain or defer to a state court in an action that involves a person asserting the rights under the Voting Rights Act asserted here. 42 U.S.C. § 1973j(f) ("The district court . . . shall exercise [jurisdiction over Voting Rights Act cases] without regard to whether a person asserting rights under [the Act] shall have exhausted any administrative or other remedies that may be provided by law.")

---

[38] The California case was a traditional "legislative deadlock" case accepted under the California Supreme Court's original jurisdiction in such circumstances. The instant case was a mandatory, but facial, review required before the redistricting scheme passed by the Florida legislature could take effect. See Fla. Const. art. III § 16(c). Moreover, in California Democratic Congressional Delegation v. Eu, the state case was filed first.

CONCLUSION

For the foregoing reasons, the judgment of the lower court with respect to the Florida House of Representatives should be affirmed in all respects.

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No. 92-519

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In the Supreme Court of the United States

OCTOBER TERM, 1992

BOLLEY JOHNSON, ET AL., APPELLANTS

v.

MIGUEL DE GRANDY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE

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QUESTIONS PRESENTED

1. Whether, under this Court's decision in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), a showing that minority group members have been denied an equal opportunity to participate in the political process and to elect representatives of their choice to a statewide legislative body, in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, may be rebutted by evidence that the minority group is proportionally represented in a particular area of the State in which additional minority districts can be drawn, but is not proportionally represented in the State as a whole.

2. Whether the district court's finding that Hispanics are sufficiently numerous and geographically compact to constitute a voting majority in two additional electoral districts for the Florida House of Representatives is clearly erroneous.

3. Whether the Full Faith and Credit Statute, 28 U.S.C. 1738, or the *Rooker-Feldman* doctrine required the district court to give preclusive effect to the Florida Supreme Court's finding that the House plan did not violate Section 2 of the Voting Rights Act.

4. Whether the district court abused its discretion in imposing a court-ordered plan for post-1992 elections without giving the State a greater opportunity to show that the plan interferes with state policy more than necessary to remedy the violation.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

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BOLLEY JOHNSON, ET AL., APPELLANTS

v.

MIGUEL DE GRANDY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 7a-76a)[1] is reported at 794 F. Supp. 1076.

JURISDICTION

The judgment of the three-judge district court (J.S. App. 1a-3a) was entered on July 2, 1992. No-

[1] The district court's judgments (J.S. App. 1a-6a) and opinion (J.S. App. 7a-76a) are identically paginated in the Appendix to the jurisdictional statement in No. 92-519, *Johnson* v. *De Grandy*, and the Appendix to the jurisdictional statement in No. 92-767, *United States* v. *Florida*. Except where otherwise indicated, all references to the J.S. App. accordingly refer to both appendices.

tices of appeal were filed on July 24, 1992, and July 29, 1992. 92-519 J.S. App. 141a-142a, 143a-144a. The jurisdiction of this Court is invoked under 28 U.S.C. 1253. This Court noted probable jurisdiction on February 22, 1993. 113 S. Ct. 1249.

STATUTORY PROVISION INVOLVED

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT

In response to the 1990 Census, the State of Florida adopted redistricting plans for the Florida Senate and the Florida House of Representatives. A three-judge district court found that the Senate plan violates the rights of Hispanics and African-Americans under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. The court, however, then adopted that very plan as a permanent remedy for those violations. The United States and a group of private plaintiffs (the De Grandy plaintiffs) have each appealed from that judgment and have filed briefs in those appeals, *De Grandy* v. *Johnson*, No. 92-593, and *United States* v. *Florida*, No. 92-767. The three-judge court also found that the Florida House of Representatives redistricting plan violates the Section 2 rights of Hispanics and adopted a plan to remedy that violation. House officials challenge that judgment in the instant appeal. This Court consolidated all three appeals and noted probable jurisdiction. 113 S. Ct. 1249 (1993). In this brief, we address the issues raised by the appeal of the House officials.

1. On June 23, 1992, the United States filed suit against the State of Florida, alleging that the State's redistricting plan for the Florida House of Representatives violates Section 2 of the Voting Rights Act, 42 U.S.C. 1973. J.A. 73-79. The United States alleged that the State's plan fragments the Hispanic population in the Dade County area so that Hispanics comprise a majority of the voting age population (VAP) in only nine House districts. J.A. 75. The complaint further alleged that if district lines in the Dade County area "respect[ed] communities of

interests and follow[ed] other nondiscriminatory plan-drawing criteria, Hispanics would constitute a significant voting-age majority of the population in two additional districts." J.A. 76. Citing racially polarized voting and other factors, the complaint alleged that "[u]nder the totality of circumstances, * * * the redistricting plan[] * * * deprive[s] Hispanic citizens * * * in the State of Florida of an equal opportunity to participate in the political process and to elect candidates of their choice to the State Legislature." J.A. 77.

The United States' suit was consolidated with two pending redistricting suits. One had been filed by the De Grandy plaintiffs, who made allegations similar to those made by the United States. The other had been filed by the NAACP and several individuals, who had challenged the plan that predated the 1990 Census. J.S. App. 12a, 18a-20a. A three-judge district court assumed jurisdiction over the consolidated cases. *Id.* at 12a, 19a & n.10.

On June 26, 1992, the United States sought a preliminary injunction against the use of the State's redistricting plan in the upcoming primaries. I Tr. 52-53. Rather than acting on that request, the district court decided to conduct an expedited trial on the merits. J.S. App. 19a.

2. On July 1, 1992, at the conclusion of trial, the district court ruled from the bench in favor of the plaintiffs. In an opinion issued on July 17, 1992, the court explained that ruling. J.S. App. 7a-76a.

a. Applying the framework established by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30, 44-45, 48-51 (1986) (see J.S. App. 26a-30a), the district court first found that while the State's plan created nine districts in which Hispanics would constitute

"voting majorities," Hispanics are sufficiently numerous and geographically compact to constitute voting majorities in two additional districts. J.S. App. 40a-41a. In reaching that conclusion, the court relied on a plan introduced by the De Grandy plaintiffs (the De Grandy plan), which contained 11 districts in which Hispanics constitute at least 64% of the VAP. *Id.* at 68a.

The court recognized that, because a significant number of Hispanics are noncitizens, it could not infer that Hispanics constitute a voting majority in the De Grandy districts solely on the ground that Hispanics constitute a majority of the VAP in those districts. J.S. App. 32a, 39a, 40a n.28. Rather, the court concluded that the De Grandy districts contain Hispanic voting majorities because (1) experience from other cases suggests that when Hispanics constitute a VAP supermajority, they are likely to constitute a voting majority; (2) actual election returns in Dade County showed that Hispanic-supported candidates would have won if they had run in the De Grandy districts; and (3) none of the De Grandy districts has such a high concentration of recent immigrants as to call into question the conclusion that Hispanics constitute a voting majority. *Id.* at 32a-40a, 69a-70a.

The court found that the State's plan creates nine rather than 11 majority-Hispanic districts by fragmenting and packing the Hispanic population in Dade County. J.S. App. 43a. Thus, the court found that one district line cut directly through the middle of an Hispanic neighborhood, that a second district was packed with Hispanic voters "to protect a white incumbent" in a nearby district, and that the way the State plan drew the lines in two other districts

"repeated the process of fragmenting Hispanic communities." *Ibid.*

The court found that the De Grandy alternative eliminated the fragmentation and packing without compromising neutral districting principles. In particular, the court found that the De Grandy districts are "relatively compact," regular in shape, and conducive to "effective representation." J.S. App. 43a-44a.

With respect to the second *Gingles* precondition (see 478 U.S. at 51), the district court found that Hispanics are politically cohesive. J.S. App. 44a-47a. The court found that there is a "high degree of political cohesiveness among Cuban voters" and "a sufficient degree of political cohesiveness among [all] Hispanics." *Id.* at 45a, 47a.

Similarly, with respect to the third *Gingles* precondition (see 478 U.S. at 51), the court found that Hispanics have been victimized by bloc voting. In particular, it found that whites and African-Americans usually vote sufficiently as a bloc to defeat the candidates preferred by Hispanics, unless those candidates run from districts in which Hispanics constitute a voting majority. *Id.* at 48a-52a.

In addition, the court cited evidence that Dade County is "profoundly divided" by the competing interests of Hispanics, African-Americans, and whites, each having different social and economic interests. J.S. App. 50a. The tensions among the three groups, the court concluded, have caused "ethnic factors * * * [to] predominate over all other factors in Dade politics." *Id.* at 50a-51a. The court also found substantial evidence of discrimination against Hispanics, including English-only initiatives

and language-based employment discrimination, *id.* at 51a-53a, and concluded that "[t]he record clearly established" that Hispanics have "borne the social, economic and political effects of this discrimination." *Id.* at 53a. Based on those findings, and the satisfaction of the *Gingles* preconditions, the court concluded that "the 'totality of circumstances' show[s] that * * * Hispanic vote dilution exists in Dade County under Florida's House plan." J.S. App. 30a.

b. Immediately after issuing its ruling on liability, the court conducted a remedial hearing. At the hearing, appellants offered a plan that had only ten majority Hispanic districts. The court rejected that plan because it did not fully remedy the violation. J.S. App. 68a-69a. Appellants then offered a second plan. That plan had 11 districts in which Hispanics constituted a supermajority of the VAP, but two of the districts had high concentrations of recent immigrants and Hispanic VAPs of only 61%. *Id.* at 69a. The court concluded that Hispanics would not constitute a voting majority in those two districts, and it rejected appellants' second plan on that basis. *Id.* at 69a-70a.

The De Grandy plaintiffs presented a modified version of their original plan. J.S. App. 70a. Like the original, the modified De Grandy plan had 11 districts in which Hispanics constituted a voting majority. *Ibid.* The court explained, however, that the modified plan "sought to respect the policy choices of the state of Florida by merging the De Grandy remedy for South Florida into the existing Florida plan." *Ibid.* The court recognized that the modified plan made adjustments in the State's plan north of the Dade County area, but it found that those changes were both "minor" and necessary to comply with

one-person, one-vote requirements. *Id.* at 70a-71a. Appellants, nonetheless, objected to the modified De Grandy plan on the ground that it would interfere with state policy choices outside Dade County.

In response, the United States suggested that the court begin with the 11 Hispanic districts from the original De Grandy plan and then allow the State to draw the remaining districts. J.A. 488, 490. Appellants, however, opposed that proposal as well, J.A. 488-489, and the court recessed. J.A. 500. When the court returned, appellants announced that they would be willing to accept the United States' proposal. *Ibid.* But the court announced that it had "done the best that we can with this case" and adopted the modified De Grandy plan. *Ibid.* The court concluded that the modified De Grandy plan "best remedies the dilution of the Hispanic vote in South Florida." J.S. App. 71a. The court therefore ordered that the 1992 elections be held under the modified De Grandy plan and that that plan also be used for post-1992 elections. *Id.* at 2a.

c. Judge Vinson filed a concurring opinion. J.S. App. 73a-76a. He explained that appellants' argument that Hispanics did not constitute a voting majority in some of the De Grandy plan's districts was based on estimates of Hispanic citizenship rates that were "unreliable" and that "must be viewed with low confidence and with a large range of error." *Id.* at 74a. He added that the plaintiffs had used "a more relevant calculation" to account for citizenship, and had also introduced convincing evidence that Hispanics could elect representatives of their choice in each of the 11 De Grandy districts. *Id.* at 75a.

In joining the court's remedial determination, Judge Vinson observed that neither of appellants' proposed remedial plans "was even close to meeting Section 2's requirements." J.S. App. 75a. He noted that appellants had also been given the opportunity to "draw a plan that incorporated the De Grandy plan for Dade County into the rest of the state," but that appellants had refused to do so. *Id.* at 76a. In Judge Vinson's view, it was "apparent that [appellants] were intent on delaying the adoption of any plan that implemented a true eleven-Hispanic districts House plan for Dade County." *Ibid.* He characterized as "too late" appellants' "belated change o[f] position and announcement" that they would be willing to draw a plan that incorporated the 11 De Grandy districts. *Ibid.*

4. On July 16, 1992, this Court issued a stay of the district court's judgment pending the outcome of this appeal. 92-519 J.S. App. 139a. As a result, the 1992 elections were held under the State's plan.

SUMMARY OF ARGUMENT

Appellants' principal contention appears to be that the key question in a Section 2 case is whether existing electoral mechanisms "deny a plaintiff class *equal* electoral opportunity." Br. 25. We agree with that contention and maintain that the framework this Court set out in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), provides an appropriate analysis to determine whether that standard is satisfied. The *Gingles* framework was applied here, and the district court concluded that plaintiffs proved a Section 2 violation under the totality of the circumstances.

Appellants' only specific quarrel with the *Gingles* framework is that, even if the *Gingles* preconditions are satisfied, a plaintiff ordinarily cannot prove that

a redistricting plan violates Section 2 if it is established that the minority group has achieved or will achieve persistent proportional representation under that plan. Six Members of this Court in *Gingles* accepted that proposition. Far from providing a reason to depart from *Gingles*, such a proportional representation defense is part of the *Gingles* framework and was fully available to appellants in this case.

Appellants cannot and did not, however, establish a proportional representation defense by showing that the State plan provides Hispanics with proportional representation in the Dade County area—that part of the State where additional Hispanic districts could be drawn. As decisions of this Court and the lower federal courts make clear, when a statewide mechanism such as a districting plan for a state legislature is involved, the proper frame of reference for a proportional representation defense is statewide. The gravamen of the vote dilution claim that was alleged and proved in this case was that Hispanics throughout the State did not have an equal opportunity to participate and elect the candidates of their choice because their votes were diluted by racial bloc voting and usual electoral defeat. The fact that minority-controlled districts can be drawn only in the Dade County area has no bearing on the scope of the claim presented.

Appellants charge that a statewide focus must be based on a theory that the interests of Hispanics who do not reside in Hispanic districts will be represented by the legislators elected from Hispanic districts. If that is so, an identical objection can be lodged against appellants' regional theory: the

State's theory depends on the premise that the interests of Hispanics not in the nine Dade County Hispanic districts drawn by the State will be represented by individuals elected from those nine districts. Moreover, appellants' approach is unworkable in practice. If proportional representation is to be measured in some area smaller than that over which the challenged electoral mechanism operates, defendants (or plaintiffs) will virtually always be able to manipulate the area to assure that there is (or is not) proportional representation in that area. Finally, appellants' claim that, based on non-record evidence, they could have prevailed even if the focus were statewide was never presented to the district court, raises a number of legal and factual issues never before litigated, and is thus unripe for consideration by this Court.

Appellants also claim that, because many Hispanics are not citizens and thus are not eligible to vote, the district court committed clear error in finding that 11 districts can be drawn in which Hispanics constitute a voting majority. A census enumeration of the number of citizens—and thus potentially eligible voters—was not available in this case, and the district court properly rejected as unreliable appellants' efforts to estimate such figures. Instead, the district court relied on a number of factors—including but not limited to evidence concerning Hispanic electoral success—to find that Hispanics constitute a voting majority in 11 districts.

The district court properly refused to give preclusive effect to the Florida Supreme Court's ruling that the State's plan did not violate Section 2. The Florida Supreme Court itself conceded that it had not had

the time to conduct the factual analysis required to determine whether the State's redistricting plan violates Section 2. Accordingly, since the issue was not fully and fairly litigated in state court, even those who were parties to the state court proceeding would not be bound by the judgment under ordinary principles of *res judicata* or full faith and credit. And, in any event, the United States was not a party to the state court proceeding and could not be bound by its results.

We agree with appellants that the district court's remedial proceedings in this case were deficient. Having found a violation of Section 2, the district court properly gave the State the opportunity to remedy it. The State submitted two plans, neither of which provided adequate remedies. In light of the severe time constraints under which it was acting, the district court could at that point have adopted the plan proposed by the De Grandy plaintiffs as an interim plan for the upcoming elections. But the district court instead adopted it as a permanent remedy. The district court should not have taken that step without affording the State a fair opportunity to contest the plan's adequacy and conformity to state policy. Accordingly, the case should be remanded to the district court for further remedial proceedings.

ARGUMENT

I. THE DISTRICT COURT PROPERLY APPLIED THE TOTALITY OF CIRCUMSTANCES TEST IN FINDING THAT THE STATE'S PLAN VIOLATES THE RIGHTS OF HISPANICS UNDER SECTION 2 OF THE VOTING RIGHTS ACT

A. The *Gingles* Framework Is Equally Applicable To Challenges To Single-Member District Plans

In *Gingles*, this Court held that a minority group challenging a multimember district as a violation of Section 2 of the Voting Rights Act must show that (1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) "it is politically cohesive;" and (3) the "majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." 478 U.S. at 50-51. Once those preconditions have been established, a court must then consider other relevant factors to determine whether, under the totality of circumstances, minority group members have been denied an equal opportunity "to participate in the political process and to elect representatives of their choice," 42 U.S.C. 1973 (b). See *Gingles*, 478 U.S. at 77-80. Those circumstances include whether there is a history of discrimination, whether there are socio-economic disparities that affect participation, whether there have been racial campaign tactics, and numerous other factors. *Id.* at 80; see also *id.* at 44-45.

This Court did not decide in *Gingles* whether the same approach should govern challenges to single-member district plans. 478 U.S. at 47 n.12. This Court has since concluded in *Growe* v. *Emison*, 113 S. Ct. 1075, 1084 (1993), however, that the three

Gingles preconditions apply to such challenges. The other factors discussed by the Court in *Gingles* as relevant under the totality of circumstances in multimember district cases are equally relevant in this context. Accordingly, the district court in this case appropriately applied the framework this Court set forth in *Gingles*.

Appellants intimate (Br. 23-26) that plaintiffs who challenge single-member district plans should have to satisfy a stricter standard than those who challenge multimember districts. But they do not describe the content or nature of the standard that they have in mind. Appellants' only concrete suggestion appears to be that a showing that the plaintiff class has the "opportunity to elect preferred candidates in numbers commensurate with the plaintiffs' percentage of the population" should be sufficient to defeat a Section 2 claim. See Appellants' Br. 26.

Insofar as appellants' complaint is that a State's showing of proportional representation should generally defeat a Section 2 claim, that complaint provides no reason to depart from the *Gingles* framework. As appellants recognize (Br. 27), Justice Brennan's opinion in *Gingles* indicated that, absent special circumstances, "persistent proportional representation" is inconsistent with an allegation that a minority group has been denied an equal opportunity to elect candidates of its choice in a multimember district. 478 U.S. at 77. And as appellants also recognize (Br. 27), Justice O'Connor's concurring opinion similarly concluded that persistent proportional representation is entitled to "great weight" under the totality of circumstances and therefore will often preclude a finding of a Section 2 violation. 478 U.S. at 104-105. Because the *Gingles* framework thus already takes into account appellants' only specific concern, they fail to present any reason why the *Gingles* framework is otherwise inadequate in redistricting cases involving single-member districts.

In any event, appellants' general suggestion that Section 2 imposes a stricter standard for challenges to single-member district plans is mistaken. The language of Section 2 does not draw any distinction between challenges to multimember districts and challenges to single-member district plans. Section 2(a) applies categorically to any "voting qualification or prerequisite to voting or standard, practice, or procedure," and Section 2(b) applies with equal generality to "the political processes leading to nomination or election." 42 U.S.C. 1973(a) and (b).

Moreover, in a series of cases decided before Section 2 was amended in 1982,[2] the Fifth Circuit had held that although vote dilution standards "were developed for use in situations involving multimember districts, they have equal application to redistricting schemes making use of single-member districts." *Kirksey* v. *Board of Supervisors*, 554 F.2d 139, 143 (5th Cir.) (en banc), cert. denied, 434 U.S. 968 (1977); see also *Robinson* v. *Commissioners Court*, 505 F.2d 674, 678 (5th Cir. 1974); *Howard* v. *Adams County Board of Supervisors*, 453 F.2d 455, 458 n.2 (5th Cir.), cert. denied, 407 U.S. 925 (1972). The legislative history of the 1982 amendments to Section 2 makes clear that Congress intended to codify the approach set forth in those decisions. S. Rep. No. 417, 97th Cong., 2d Sess. 32 (1982).

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[2] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 134; see *Gingles*, 478 U.S. at 35.

No court has ever held that a stricter standard should govern challenges to single-member district plans. This Court noted in *Growe*, 113 S. Ct. at 1084, that multimember districts generally pose a greater danger of dilution than single-member districts.[3] But that observation simply suggests that challenges to multimember districts may be more likely to succeed than challenges to single-member district plans. It does not suggest that a different standard should be used to determine whether dilution has been proven.

In any event, once a court determines that a single-member district plan fragments a minority population community, the distinction between multimember district and single-member district cases vanishes. The district court in this case made precisely such a finding, see J.S. App. 43a, and appellants have not challenged that finding as clearly erroneous. As the Fifth Circuit noted in *Kirksey*, 554 F.2d at 149, a single-member district plan that fragments a geographically concentrated minority community in a setting where bloc voting is prevalent has the same inherent tendency to dilute the minority's voting strength as would a multimember district plan.

B. The District Court Did Not Apply A Maximization Standard

Appellants next argue (Br. 28-29) that the district court's liability determination is premised on the view that Section 2 requires a State to maximize a minority group's voting strength. Appellants are mistaken. The district court's liability determination reflects a straightforward application of Section 2's totality-of-circumstances test and this Court's decision in *Gingles*.

The district court began its analysis by carefully applying the three *Gingles* preconditions. See 478 U.S. at 48-51. First, it found that the State's plan fragmented and packed the Hispanic population and that, absent that fragmentation and packing, Hispanics are sufficiently numerous and geographically compact to constitute a majority in two additional single-member districts. J.S. App. 30a-44a. Second, it found that Hispanics are politically cohesive. *Id.* at 44a-47a. And third, it found that, except in districts in which Hispanics constitute a voting majority, non-Hispanics usually vote sufficiently as a bloc to defeat Hispanic-preferred candidates. *Id.* at 48a-52a.

After finding the *Gingles* preconditions satisfied, the district court examined the "totality of circumstances," as required by Section 2(b). It cited evidence that Dade County is "profoundly divided" along racial and ethnic lines, that there is "tension" among Hispanics, whites, and African-Americans, and that "ethnic factors * * * predominate over all other factors in Dade politics." J.S. App. 50a-51a. Such evidence refutes any suggestion that the observed bloc voting patterns are simply a response to particular candidates and that other candidates equally preferred by the minority might be able to attract the support of the majority. *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring in the judgment). It also suggests that candidates elected with-

[3] The district court in *Growe* concluded that single-member district plans should be easier to challenge. See 113 S. Ct. at 1083. Although this Court rejected that position in *Growe* (*id.* at 1084), it did not suggest that single-member district plans should be more difficult to challenge.

out Hispanic support may not be willing to take the interests of Hispanics into account. *Ibid.*

Finally, the court found substantial evidence of discrimination against Hispanics, including English-only initiatives and language-based employment discrimination. J.S. App. 53a. Such evidence is also "supportive of" a finding of vote dilution (*Gingles*, 478 U.S. at 49 n.15, 80), because it "strengthen[s] a court's confidence that minority voters will be unable to overcome the relative disadvantage at which they are placed by a particular districting plan," and "suggest[s] a more general lack of opportunity to participate in the political process." *Id.* at 93 (O'Connor, J., concurring in the judgment).

Based on those findings, the district court concluded that plaintiffs had satisfied each of the *Gingles* preconditions and that the "totality of circumstances" showed that the State's plan dilutes the voting strength of Hispanics in violation of Section 2. J.S. App. 30a. In short, the district court properly followed the approach set forth by this Court in *Gingles*.

C. The District Court Correctly Rejected Appellants' Proportional Representation Defense

Appellants' sole basis for their claim that the district court applied a maximization standard is that the court did not accept their proportional representation defense. That defense is premised on the fact that 45% (nine out of 20) of the districts drawn in the Dade County area contain Hispanic voting majorities, and Hispanics constitute approximately 45% of the voting age population in the same Dade County area. See Appellants' Br. 29. According to appellants, the State's districting plan promises proportional representation in the Dade County area, and

such proportional representation constitutes a complete defense to the plaintiffs' Section 2 claims.

We agree that persistent proportional representation is generally a defense to a Section 2 claim. See *Gingles*, 478 U.S. at 77 (opinion of Brennan, J.); *id.* at 102 (O'Connor, J., concurring in the judgment). And we also agree that such a defense can be based on the likely effects of a plan that has not yet been put into effect, just as it can be based on the actual results of past elections. But appellants have selected the wrong frame of reference in mounting a proportional representation defense.

When a dilution challenge to the redistricting of a statewide body is presented, any defense based on proportional representation must be statewide as well. Appellants did not assert below that there would be statewide proportional representation. Nor did they offer evidence that would support that conclusion. Accordingly, the district court properly rejected appellants' proportional representation defense.

1. *Proportional Representation Should Be Measured On A Statewide Basis*

a. In vote dilution cases under Section 2 of the Voting Rights Act, minority voters in the political jurisdiction whose voting practice is challenged often live outside the majority-minority districts that may be drawn to remedy a violation. But that does not mean vote dilution cases are brought only on behalf of those minority voters who reside in whatever remedial districts ultimately are drawn. The votes of all minority voters in the jurisdiction are diluted due to the combination of racially polarized voting and the State's failure to draw minority districts where such districts are possible. When a violation is found, a court draws minority districts

that include only some of the minorities in the political jurisdiction, but that remedies vote dilution throughout the jurisdiction. *McGhee* v. *Granville County*, 860 F.2d 110, 118-119 & n.9 (4th Cir. 1988); *Campos* v. *City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988), cert. denied, 492 U.S. 905 (1989); *Gomez* v. *City of Watsonville*, 863 F.2d 1407, 1414 (9th Cir. 1988), cert. denied, 489 U.S. 1080 (1989).

As the Fourth Circuit explained in *McGhee*, "the claim of dilution * * * is made by a class consisting of *all* the [minority] voters of the jurisdiction," even though "not all can be placed in safe districts." 860 F.2d at 118 n.9. "That not all can be given the remedy of assured *direct* representation," the Fourth Circuit explained, "does not * * * mean that the remedy is wholly ineffectual as to those not included in 'safe' districts." *Ibid.* Rather, "it must in logic be assumed that the special interests of minority voters not included in safe districts will nevertheless be 'represented,' albeit less directly, by those minority candidates elected from 'safe' districts." *Ibid.* See also *Baird* v. *Consolidated City of Indianapolis*, 976 F.2d 357, 359-360 (7th Cir. 1992) (proportional representation should be determined by the "success by minorities throughout the jurisdiction as a whole"), cert. denied, No. 92-1415 (May 17, 1993); cf. *Wells* v. *Rockefeller*, 394 U.S. 542, 546 (1969) (to comply with one-person, one-vote rule, State must equalize population in districts throughout the State; it is insufficient merely to equalize population only within defined regions of the State).

Thus, the analysis in a case such as this parallels that of *Davis* v. *Bandemer*, 478 U.S. 109 (1986), which involved a claim that state legislative district lines were drawn to dilute the votes of Democrats, in violation of the Equal Protection Clause. The plurality recognized that, although the plaintiffs "cited instances of individual districting within the State which [plaintiffs] believe exemplify * * * discrimination," their claim was "that Democratic voters over the State as a whole, not Democratic voters in particular districts, have been subjected to unconstitutional discrimination." *Id.* at 127 (opinion of White, J.) Two Justices who did not join the plurality agreed: "If Democratic voters in a number of critical districts are the focus of unconstitutional discrimination, * * * the *effect* of that discrimination will be felt over the State as a whole." *Id.* at 169 (Powell, J., concurring in part and dissenting in part).

b. Appellants' contention (Br. 35) that a statewide focus would "effectively read the first *Gingles* requirement—'compactness'—out of the law" is inexplicable. Nothing in our submission supports the conclusion that a district court may draw "non-contiguous districts," as appellants suggest. See Br. 36. To the contrary, our submission is that the district court properly inquired whether plaintiffs could satisfy the compactness requirement set forth in *Gingles* itself and correctly found that they had. See pp. 32-34, *infra*.

The compactness requirement is not intended, as appellants seem to believe (Br. 35-36), to identify which minority group members have had their votes diluted. Rather, it is designed to determine whether the dilution of the minority's votes is caused by the geographic dispersal of the minority population or by the State's failure to draw minority districts. As the Court stated in *Gingles*, "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U.S. at 50 n.17; see also

ibid. ("if the minority group is spread evenly throughout a multimember district, * * * these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure").

c. Appellants' reliance on the treatment of proportional representation in *Gingles* (Br. 36-37) to support their geographically circumscribed proportional representation defense is misplaced. In *Gingles*, plaintiffs alleged that minority voters in particular multimember districts had less opportunity to elect representatives of their choice than did whites in those districts. With respect to one district—District 23—this Court rejected the plaintiffs' claim because they had achieved persistent proportional representation in that district. See 478 U.S. at 77 (opinion of Brennan, J.); *id.* at 102-103 (O'Connor, J., concurring in the judgment). But the plaintiffs in *Gingles* made no claim that the boundaries of District 23 were drawn in such a way as to dilute minority voting strength—a claim that would have been more analogous to the claim the plaintiffs made in this case. Instead, they challenged the mechanism of electing candidates at large from a multimember district, and the Court analyzed whether there was proportional representation within that particular district.[4]

In addition, in light of the plaintiffs' claim in *Gingles*, proof of statewide proportional representation would have been irrelevant. Plaintiffs were asking simply that District 23 be split into single-member districts, in which—as the Court's finding of proportional representation made clear—they would be

[4] Unlike this case, there could thus be no dispute concerning the definition of the area over which there was asserted to be proportional representation. See p. 25, *infra*.

able to achieve roughly the same electoral success as they already had achieved in District 23. Because the acceptance or rejection of the plaintiffs' claim thus would not have affected the extent to which they were proportionally represented statewide, the question whether there was statewide proportional representation was irrelevant.[5]

d. Appellants criticize the statewide approach because in their view it relies on a theory of "virtual representation." See Br. 36 (internal quotation marks omitted). But if that criticism were valid, it would apply equally to the defense appellants raise. As the district court found (J.S. App. 43a), Florida's plan for its House of Representatives fragments Hispanic population concentrations in Dade County such that many Hispanics are in districts in which they are in the minority, rather than the majority. Appellants' version of the proportional representation defense rests on the premise that the fragmentation and consequent diminution in the voting power of *those* Hispanics is acceptable because *other* Hispanics in the Dade County area will be in districts in which Hispanics constitute a majority.

[5] Appellants err in relying (Br. 37 n.60) on this Court's summary affirmance of *Nash* v. *Blunt*, 797 F. Supp. 1488, 1499 (W.D. Mo. 1992), aff'd mem., 113 S. Ct. 1809 (1993). As appellees' motions to dismiss or affirm in that case make clear, there were several grounds for affirmance—including appellants' failure to include any argument in their jurisdictional statement, see 92-1249 Motion of Appellees Blunt and Ashcroft to Dismiss at 18-19; 92-1249 Motion of Appellees Stoff and Weems Intervenors to Dismiss at 4-5—that had nothing to do with the merits of the district court's decision. See *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (per curiam) (summary affirmance determines only those issues that were "necessarily decided").

Thus, appellants' own version of the proportional representation defense appears to rest on the premise that the interests of Hispanics outside the districts in which Hispanics are in the majority will be "represented" in some measure by the House members elected from those districts. If appellants were correct that principles of "virtual representation" are altogether irrelevant under Section 2, their own proportional representation defense would make no sense.

Appellants also assert (Br. 36) that members of the Florida House of Representatives elected by Hispanics in the Dade County area cannot represent the interests of Hispanics elsewhere, who may have different needs. Once again, appellants' own version of the proportional representation defense could be subject to precisely the same criticism: it could be contended that House members elected in the State's nine Hispanic districts in Dade County cannot represent the interests of Hispanics in Dade County who live outside those districts. But, whether applied to Dade County or statewide, appellants' argument misunderstands the underpinnings of the proportional representation defense insofar as the notion of "virtual representation" is concerned. The theory is not that House members elected by Hispanic majorities will represent the interests of Hispanics outside their districts on all issues. Rather, it is that they will tend to do so on those issues that are of special concern to Hispanics, such as English-only initiatives and language-based employment discrimination.

e. A statewide approach to the proportional representation defense is not only firmly grounded in precedent and sound in theory; it also works in practice. A statewide approach provides a clear and objective measure of proportional representation. The same cannot be said of a regional approach. Plaintiffs will almost always be able to define an area in which there is not proportional representation, while defendants will almost always be able to define an area in which there is. For example, in this case, the United States or the De Grandy plaintiffs could have defined the relevant area as the portions of Dade County that do not include the nine Hispanic-majority districts in Florida's House plan. Hispanics have no representation in that area, much less proportional representation. Conversely, appellants could have defined the relevant area as the nine districts in which Hispanics constitute a majority, and then argued that Hispanics are dramatically overrepresented because they control 100% of those districts even though they constitute only 72% of the VAP in that area. See J.S. App. 67a (giving Hispanic VAP of each district).

Appellants' efforts to identify the relevant proportional representation area further illustrates the practical difficulties with a regional approach. In their jurisdictional statement, appellants argued that Dade County was the relevant area for determining proportional representation. See J.S. 18-19. But because the State itself does not follow county lines in redistricting, that definition of the relevant area could not be justified. Appellants now assert that the relevant area is a 20-district area that includes 17 districts in Dade County and three districts that include parts of Dade County and parts of adjacent counties. See Br. 5 n.10, 29. That area is also artificial. It simply reflects the State's choices in

the redistricting process concerning what areas to combine with Dade County and what areas not to combine, without any explanation of why that area—rather than Dade County proper, some portion thereof, a broader region encompassing Dade County, or the State as a whole—is the proper point of reference.

For the foregoing reasons, when plaintiffs make a statewide claim of vote dilution involving a legislative body with statewide jurisdiction, the relevant area for determining a proportional representation defense must be the entire State as well. Any other approach compares apples and oranges.

2. *Appellants' Alternative Defense Of Statewide Proportional Representation Was Not Raised In The District Court And Is Not Ripe For Consideration By This Court*

Appellants also contend (Br. 37-38) that, even if a proportional representation defense should be analyzed on a statewide basis, such a defense can be made out in this case. Appellants base that claim on census figures that were not part of the trial record, but that the United States first brought to the attention of the parties in its Motion to Affirm in Part and Vacate In Part (at 14 n.5) in this case.[6] Those figures show that Hispanics constitute 7.15% of the citizen voting age population (CVAP) of Florida. Accordingly, if a plan had been designed to afford

[6] The information we provided the Court comes from a special tabulation of 1990 Census data prepared by the Bureau of the Census in order to assist in the consideration of amendments to the language-minority election requirements of Section 203(b) of the Voting Rights Act, 42 U.S.C. 1973aa-1a(b).

Hispanics representation in proportion to their numbers in the *citizen* voting age population in the State as a whole, it would have eight or nine Hispanic seats (120 × 7.15% = 8.58).[7] Since that is very close to what the State's plan actually provides, appellants contend that the post-trial data provide the basis for a proportional representation defense even on a statewide basis.

As we stated when we initially brought the census figures to the attention of the Court and the parties, we do not believe that it would be appropriate for this Court to reach the question of whether appellants could have made out a proportional representation defense on the basis of the non-record census figures. In the first place, because the data are not in the record and are available at the present time only in an unpublished letter, all of the parties have not had an opportunity to examine the data and litigate whatever issues they believe necessary concerning their interpretation and reliability. Cf. Fed. R. Evid. 201(e). In addition, before appellants could make use of the census figures, it would have to be determined whether they had waived any statewide proportional representation defense based on CVAP and whether the particular facts of this case would warrant a finding of a Section 2 violation irrespec-

[7] By contrast, Hispanics constitute 12.2% of the State's total population and 11.7% of the State's VAP. J.A. 74, Gov't Exh. 6. If a plan had been designed to afford Hispanics representation in proportion to their total population or VAP, it would have 14 or 15 Hispanic seats (120 × 12.2% (or 11.7%) = 14.64 (or 14.04)). The State's plan, however, has only nine districts in which Hispanics constitute a voting majority—far less than proportional representation. J.S. App. 67a.

tive of proof of statewide proportional representation based on CVAP.[8]

More importantly, however, the question whether total population or some other measure is appropriate for measuring proportional representation has never been litigated in this case—or, to the best of our knowledge, in any other case.[9] In *Gingles*, this Court apparently assumed that total population was the correct measure. Although the Court appropriately described the first *Gingles* precondition as a requirement that minority group members show that they could constitute a voting majority in a geographically compact district, 478 U.S. at 50 n.17, it discussed proportional representation in terms of total population. *Id.* at 74 n.35, 77. Before departing from that assumption, a number of legal and practical difficulties with doing so would have to be confronted.

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[8] In *Gingles*, Justice Brennan, joined by one other Justice, noted that "[i]n some situations, it may be possible for § 2 plaintiffs to demonstrate that [persistent proportional representation] does not accurately reflect the minority group's ability to elect its preferred representatives." 478 U.S. at 77. In addition, although Justice O'Connor, joined by three other Justices, stated that proportional representation is "presumptively inconsistent with the existence of a § 2 violation," *id.* at 102, and "as a general rule" is "entitled to great weight," *id.* at 104, she did "not propose that * * * proportional minority electoral success should always, as a matter of law, bar finding a § 2 violation." *Ibid.* See *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975) (proportional representation no defense to Section 5 of the Voting Rights Act where there is proof of purposeful discrimination).

[9] The only case cited by appellants (Br. 38) in support of their argument is *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 945 (7th Cir. 1988), cert. denied, 490 U.S. 1031 (1989). That case did not involve a proportional representation defense.

In carrying out its redistricting, the State of Florida has chosen to draw legislative districts of roughly equal total population, rather than roughly equal numbers of eligible voters, as it might have done. *Burns* v. *Richardson*, 384 U.S. 73, 92 (1966). In so choosing, Florida has determined to pursue the goal of ensuring that each representative serves the same number of people, so that the people generally have equal representation, rather than the goal of ensuring that voters have an equal impact on elections. See, *e.g.*, *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 531 (1969). Complex issues would be raised by permitting the State, after the fact, to advance CVAP as a measure of proportional representation for the purpose of justifying a level of minority voting strength below that which would exist if the State adhered to the policy on which its redistricting is based—namely measuring representation by total population. As a result of the State's inconsistency, cf. *Kirkpatrick*, 394 U.S. at 530-531, 534-536, it could be argued that Hispanic citizens as a group have *less* representation—since their representatives must represent more *people*—than other citizens in Florida. Cf. *Garza* v. *County of Los Angeles*, 918 F.2d 763, 773-776 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991). Because most states base their redistricting on total population data, a departure from the use of total population for purposes of considering the proportional representation defense would raise serious concerns under the Voting Rights Act.

In addition to legal considerations, there would be substantial practical difficulties with the approach appellants propose. Some individuals are eligible to vote in Florida even though they would be unlikely to have been included in the census figures relied

upon by appellants, and others are ineligible to vote in Florida despite the fact that they were likely to have been included in the census figures.[10] Moreover, if the inquiry were designed to isolate the narrowest definition of "voters," it would be limited to registered (or even actual) voters—a limitation that this Court has consistently rejected in voting rights cases. See, *e.g.*, *City of Rome* v. *United States*, 446 U.S. 156, 186 n.22 (1980); *Ely* v. *Klahr*, 403 U.S. 108, 115 n.7 (1971); *Burns* v. *Richardson*, 384 U.S.

[10] The Census Bureau counts the population of an area in accordance with the "usual residence" rule. See *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2772 (1992); *Borough of Bethel Park* v. *Stans*, 449 F.2d 575 (3d Cir. 1971) (explaining and applying rule). Aside from federal employees, see *Franklin* v. *Massachusetts*, *supra*, the Census Bureau count does not include Americans whose usual residence is abroad, except insofar as they may be included by someone filling out a census form in the United States. It does include students, members of the armed forces, and others living in Florida whose legal residence (for voting purposes) is in another State. Cf. *Burns* v. *Richardson*, 384 U.S. at 90-91 & n.18 (discrepancies in districts in which there are substantial military populations).

Under Florida law, a number of groups other than noncitizens are excluded from the franchise, such as convicted felons who have not had their civil rights restored and those adjudged mentally incompetent. Fla. Stat. Ann. § 97.041(3) (West 1982). In addition, the State of Florida permits a person to vote if that person is "a legal resident of Florida and of the county where he wishes to register." Fla. Stat. Ann. § 97.041(1)(a) (West Supp. 1993). Legal residence depends on a bona fide intention to become a resident of Florida to the exclusion of any other State or county. 1971 Ann. Report of Fla. Atty. Gen. 287 (No. 071-202A). Accord, *Herron* v. *Passailaigue*, 110 So. 539, 543 (Fla. 1926); see *Rosenthal* v. *Esquinaldo*, 443 So. 2d 281, 282 (Fla. Dist. Ct. App. 1983) (per curiam), rev. denied, 451 So. 2d 850 (Fla. 1984).

at 92-93. Finally, an unknown number of Hispanics who were noncitizens at the time of the Census were eligible to become citizens and either have become citizens by now or may do so at any time in the future.[11] The question whether the population figures would have to be adjusted to take account of some or all of the above inclusions and exclusions from the electorate—including those based on citizenship—has not been presented to or addressed by the district court.

A further issue is raised by the fact that, as this case illustrates, census CVAP figures are usually unavailable at the time of redistricting. See *Garza* v. *County of Los Angeles*, 756 F. Supp. 298, 1322 (C.D. Cal.), aff'd, 918 F.2d 763 (9th Cir. 1900), cert. denied, 498 U.S. 1028 (1991). To make those figures a central focus of Section 2 litigation would undermine the goals of predictability and prompt resolution of redistricting challenges. Those participating in the redistricting process, including state officials, minority group members, and others, would have no basis for gauging whether various plans afford proportional representation at the time the plans must be drawn, reviewed, and, if necessary, submitted for preclearance pursuant to Section 5 of the Voting

[11] In addition to noncitizens who were eligible for citizenship at the time of the 1990 Census, many noncitizens who were not eligible to become citizens at that time will become eligible over the life of the redistricting plan. In fact, as a result of the amnesty provisions of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201(a)(1), 100 Stat. 3394, there will be a particularly large group of such persons within the next few years. See 8 U.S.C. 1255a(b)(1) (qualified aliens may become lawful permanent residents nineteen months after being granted lawful temporary residence under IRCA); 8 U.S.C. 1427(a) (five years' lawful permanent residence required for naturalization).

Rights Act, 42 U.S.C. 1973. In short, the claim made by appellants should not be litigated for the first time in this Court, especially in the absence of any evidentiary record on which to address it.[12]

3. *The United States Alleged And Proved Statewide Vote Dilution In This Case*

Appellants argue (Br. 32) that a statewide focus is inconsistent with the allegations made in our complaint, which in their view "expressly alleged vote dilution in the 20-district 'Dade County area'" and "identif[ied] this 20-district 'Dade County area' as the area in which the alleged vote dilution occurred." Appellants are mistaken.

The complaint does indeed "expressly allege" that the State's plan "fragments" Hispanic population concentrations in the Dade County area. J.A. 75. But it also expressly alleges—in a passage not quoted or discussed by appellants—that that fragmentation "deprive[s] Hispanic citizens * * * *in the State of Florida* of an equal opportunity to participate in the political process and to elect candidates of their choice to the State Legislature." J.A. 77 (emphasis added). The government's closing argument at trial was equally explicit. There, the government stated that "this case is not about Dade County." J.A. 472. It noted that the "State's defense in this case basically boils down to you carve out Dade County from the state of Florida and then you look to see how many districts you can draw in Dade County." J.A. 473. And it took the position that that defense should

[12] As we argue below, this case should be remanded to the district court in any event. At that time, the district court may decide whether it is appropriate to entertain appellants' new statewide proportional representation defense based on CVAP.

not prevail because "the state of Florida is governed by the Florida Senate and the Florida House of Representatives." *Ibid.*

Appellants also contend (Br. 35) that the plaintiffs "waived any claims of vote dilution outside Dade * * * Count[y]" and cite several passages from the transcript in which the district court ruled out challenges to the districting in other areas of the State. No such waiver took place. To be sure, the cited transcript passages make clear that this case as tried involved only claims that additional Hispanic districts could be drawn in the Dade County area. The United States accordingly neither alleged nor attempted to prove that additional Hispanic districts could be drawn anywhere else in the State. But the claim that the United States *did* allege and prove was that the votes of Hispanics throughout the State were diluted. The fact that additional Hispanic districts could be drawn only in the Dade County area casts no doubt on that claim.

Appellants also argue (Br. 32-35) that the United States and the De Grandy plaintiffs failed to prove that Hispanics throughout the State are cohesive. But appellants' own expert testified that "generally speaking voting did tend to be polarized in Florida" (J.A. 347) and that while Hispanics are less cohesive than blacks, "the majority of Hispanics tend to vote for Hispanics." J.A. 266. Moreover, the State had already conceded that Hispanics were generally cohesive throughout the State in the congressional redistricting phase of this case. 92-519 J.S. App. 79a. Given that concession, there was no need for further proof on that point. See Order of June 18, 1992, doc. 449, at 4 (taking judicial notice of congressional proceedings). We do not quarrel with appellants' point that not all Hispanics throughout the State

are cohesive. But under *Gingles*, unanimity is not the test. Plaintiffs must show that minority group members are cohesive to a significant degree. 478 U.S. at 56. That standard was satisfied here.[13]

II. THE DISTRICT COURT'S FINDING THAT HISPANICS COULD CONSTITUTE A VOTING MAJORITY IN TWO ADDITIONAL DISTRICTS IS NOT CLEARLY ERRONEOUS

Appellants argue (Br. 39-44) that the district court's finding that Hispanics constitute a voting majority in the 11 districts proposed in the De Grandy plan is clearly erroneous. That argument is without merit.

A. In resolving this issue, the district court first took into account experience from other cases indicating that when Hispanics constitute more than 60% of the VAP, they are likely to constitute a voting majority. J.S. App. 31a-33a, 39a-40a & n.28. Because Hispanics constitute more than 60% of the VAP in all of the De Grandy districts, that experience is relevant here. In fact, Hispanics constitute more than 64% of the VAP in all of the De Grandy districts. *Id.* at 68a. That evidence makes it all the more likely that Hispanics constitute a voting majority in those districts. Cf. *Brewer* v. *Ham*, 876 F.2d 448, 452 (5th Cir. 1989) (evidence that blacks constitute a supermajority of the total population is

[13] Appellants argue (Br. 35) that Hispanic-supported candidates are not usually defeated by bloc voting. In fact, however, appellants cite only one example of an Hispanic-supported candidate who was elected in a district in which Hispanics did not constitute a voting majority. Thus, what is true in Dade County is also true statewide: non-Hispanics usually vote sufficiently as a bloc to defeat Hispanic-preferred candidates unless those candidates run from majority-Hispanic districts.

sufficient to show that they constitute a voting majority).

Second, the district court considered actual election returns showing that Hispanic-preferred candidates have consistently won in districts in which Hispanics constitute more than 59% of the VAP, as is true in the De Grandy districts. J.S. App. 36a-37a, 57a. Because voting in Dade County is highly polarized, such evidence further supports the conclusion that Hispanics constitute a voting majority in those districts. *Westwego Citizens For Better Gov't* v. *Westwego*, 906 F.2d 1042, 1046-1047 (5th Cir. 1990).

Finally, the district court carefully examined evidence about where citizens and noncitizens are most heavily concentrated in Dade County. The court satisfied itself that none of the De Grandy districts has such a high concentration of recent immigrants as to call into question the conclusion that Hispanics constitute a voting majority. See J.S. App. 38a, 57a, 58a n.46, 69a-70a.

B. Appellants contend (Br. 41-42) that the so-called 60% rule was insufficient by itself to support a finding that Hispanics constitute a voting majority. But as the discussion above demonstrates, the court did not rely on that evidence alone. While the court used the 60% rule as one factor in its analysis, it also relied on evidence that Hispanics constitute more than 64% of the VAP in the De Grandy districts, that Hispanic-preferred candidates would have won if they had run in the De Grandy districts, and that the Hispanic VAP in the De Grandy districts is sufficient to account for the higher concentrations of noncitizens in certain of those districts.

C. Appellants also contend (Br. 42) that the district court clearly erred in relying on actual elec-

tion experience showing that Hispanic-preferred candidates would have won if they had run in the De Grandy districts. By relying on such evidence, appellants contend, the district court implicitly recognized a right under Section 2 to "influence" districts—*i.e.*, districts in which minority group members constitute a voting *minority*, but can still elect candidates of their choice because of crossover voting. See *Voinovich* v. *Quilter*, 113 S. Ct. 1149, 1155, 1157 (1993). But the district court did not rely on the election evidence to conclude that the De Grandy districts are "influence" districts. Rather, it viewed that evidence as one factor suggesting that Hispanics constitute a voting *majority* in those districts. That inference was a permissible one. As this Court has recognized, evidence that minority group members constitute a voting majority supports the conclusion that they have the potential to elect candidates of their choice. *Growe*, 113 S. Ct. at 1084. The converse is also true: evidence that minority group members can elect their preferred candidates despite polarized voting tends to establish that they constitute a voting majority.[14]

D. Finally, appellants argue (Br. 41-42) that the district court erred in failing to credit their expert's opinion that Hispanics constitute a voting majority in only three of the 11 De Grandy districts. In appellants' view (Br. 41), their expert's opinion should have been treated as conclusive because it was based on "actual data."

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[14] Because the district court did not find a violation of Section 2 based on the State's failure to create "influence" districts, the question whether such claims will lie under Section 2 is not presented here. As appellants note (Br. 42 & n.68), this Court has reserved that question. *Voinovich*, 113 S. Ct. at 1155.

Appellants' expert did not, however, produce actual data regarding the percentage of Hispanics eligible to vote in each De Grandy district. Such data were not available. See J.S. App. 74a (Vinson, J., concurring). Appellants' expert began with the overall citizenship rate in Dade County, which he obtained from the Census; he then performed a regression analysis to estimate the percentage of Hispanic and non-Hispanic citizens in Dade County; and, as a final step, he used those county-wide figures to estimate the Hispanic citizen VAP in each De Grandy district. 92-519 J.S. App. 187a-198a; see J.S. App. 74a (Vinson, J., concurring). Accordingly, what appellants refer to as "actual data" are really estimates derived from estimates.

In addition, the analysis performed by appellants' expert was seriously flawed. It relied upon a county-wide Hispanic citizenship rate that was subject to a high rate of error. See J.S. App. 74a (Vinson, J., concurring). It did not attempt to deal with possible variations at the district level. *Id.* at 38a n.26. And it took no account of other evidence in the record. In particular, the expert's analysis posited that districts in which Hispanics constitute 66% of the VAP would nevertheless be less than 50% Hispanic among eligible voters, *id.* at 38a, even though election returns establish that any district in which Hispanics constitute more than 65% of the VAP is a "safe" Hispanic seat. *Id.* at 37a; see generally *id.* at 74a-75a (Vinson, J., concurring). Given those deficiencies, the district court reasonably concluded that appellants' evidence did not overcome the plaintiffs' showing that Hispanics constitute a voting majority in the 11 De Grandy districts.

III. THE DISTRICT COURT CORRECTLY REFUSED TO GIVE PRECLUSIVE EFFECT TO THE FLORIDA SUPREME COURT'S DETERMINATION THAT THE HOUSE PLAN DID NOT VIOLATE SECTION 2

In accordance with its responsibilities under the Florida State Constitution, the Florida Supreme Court reviewed the State's reapportionment plan and issued a final judgment upholding its validity.[15] 92-519 J.S. App. 104a-138a. The De Grandy plaintiffs were parties to that proceeding, and they urged the Florida Supreme Court to find that the plan did not comply with Section 2 of the Voting Rights Act. Because the Florida Supreme Court determined that the plan did not "discriminate against minorities," *id.* at 119a, appellants argue (Br. 45-46) that the Full Faith and Credit Statute, 28 U.S.C. 1738, and principles of res judicata precluded the De Grandy plaintiffs from relitigating their Section 2 claim in federal court. Appellants are incorrect.

A. Parties to a proceeding are bound by the judgment only when they have had a full and fair opportunity to litigate the claim resolved by the judgment. See *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 480-481 & n.22 (1982); *Allen* v. *McCurry*, 449 U.S. 90, 95 (1980). The De Grandy plaintiffs did not have such an opportunity. In particular, the Florida Supreme Court did not afford the De Grandy

[15] Review was conducted pursuant to Fla. Const. of 1968, Art. III, § 16(c), which provides that the Attorney General of Florida "shall" petition the Florida Supreme Court for "a declaratory judgment determining the validity of [a legislative] apportionment" within 15 days after its enactment, and that the Florida Supreme Court "shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment."

plaintiffs an opportunity for a trial on their Section 2 claim before it rendered its judgment. Moreover, the Florida Supreme Court specifically refrained from making the sort of factual findings necessary to resolve that claim, stating that "it [wa]s impossible for [it] to conduct the complete factual analysis contemplated by the Voting Rights Act * * * within the time constraints of [the Florida Constitution]." 92-519 J.S. App. 113a. In concluding that the House plan did not discriminate against minorities, the Florida Supreme Court conducted only a limited review of that issue based on written submissions. *Id.* at 119a.

Appellants do not argue that the De Grandy plaintiffs had a full and fair opportunity to litigate their Section 2 claim before the Florida Supreme Court rendered its final judgment. Rather, they cite (Br. 45) the Florida Supreme Court's willingness to conduct a *post*-judgment trial on that claim. The fact remains, however, that the Florida Supreme Court rendered the final judgment to which appellants seek to give preclusive effect without having held a trial. Appellants cite no authority for that result.[16]

B. In any event, the United States was not a party to the proceeding before the Florida Supreme Court. As appellants appear to concede (Br. 45 & n.72), the United States therefore could not be bound by that court's judgment. *Martin* v. *Wilks*, 490 U.S. 755, 761 (1989). For that reason, in the analogous context of cases arising under Section 5 of the Voting Rights Act, this Court has specifically held that "[t]he Attorney General is not bound by the resolution of

[16] *Kremer* v. *Chemical Construction Corp.*, 456 U.S. at 485, cited by appellants (Br. 45), is inapposite. In *Kremer*, the plaintiff was given a full and fair opportunity to litigate his claim before a final judgment was rendered.

* * * issues in cases to which he was not a party." *Hathorn* v. *Lovorn*, 457 U.S. 255, 269 n.23 (1982).

Appellants nonetheless contend (Br. 46-47) that the United States should have been precluded from bringing its Section 2 claim by the so-called *Rooker-Feldman* doctrine. See *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 482 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). That doctrine precludes federal district courts from engaging in appellate review of state court judgments. That doctrine is inapplicable here.

First, in both *Rooker* and *Feldman*, a *party* to a state (or District of Columbia) court proceeding sought review of that court's judgment in federal district court as a *substitute* for a direct appeal to this Court. This Court held that under 28 U.S.C. 1257, the exclusive way for a party to challenge a state court judgment is through a direct appeal to this Court. *Feldman*, 460 U.S. at 476, 482; *Rooker*, 263 U.S. at 416. Because the United States was not a party to the Florida Supreme Court proceeding, it did not have an opportunity to appeal that court's judgment to this Court. Accordingly, the United States' original action in federal district court cannot be viewed as an effort to circumvent 28 U.S.C. 1257.

Second, in both *Rooker* and *Feldman*, the parties directly attacked the state court's judgment in federal court. In *Rooker*, the plaintiffs brought "a bill in equity to have a judgment of a [state court] declared null and void." 263 U.S. at 414. In *Feldman*, the plaintiffs filed suit against the District of Columbia Court of Appeals and directly challenged the refusal of that court to admit them to the bar. 460 U.S. at 468 & n.2, 472 & n.8. In this case, by contrast, the United States did not directly attack any ruling of the Florida Supreme Court. Instead, it sought to litigate de novo its claim that the State's redistricting plan for the Florida House of Representatives violates Section 2.

Appellants attempt to stretch the *Rooker-Feldman* doctrine far beyond its limited reach. Under their view of the doctrine, state court judgments would bind everyone, including those who were not parties to the litigation. Cf. *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483 (1942) (state court precedents do not bind federal courts). That would make the Full Faith and Credit Statute and principles of res judicata superfluous. It also would effectively negate Section 12(f) of the Voting Rights Act, 42 U.S.C. 1973j(f), which confers on the United States unqualified authority to file a suit under Section 2 in federal district court. And it would conflict with the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litgation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940). Appellants' extreme and unjustified interpretation of the *Rooker-Feldman* doctrine should be rejected.[17]

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[17] Appellants argue (Br. 46 n.73) that principles of federalism required the district court to dismiss plaintiffs' Section 2 claims. But as this Court explained in *Growe*, federalism principles do not require dismissal in this context. 113 S. Ct. at 1080. Rather, they require a federal district court to wait until the state court has reached a final determination (assuming there is sufficient time), and to give that judgment the effect required by the Full Faith and Credit Statute. *Id.* at 1080-1083. The district court acted in compliance with those principles.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN IMPOSING THE MODIFIED DE GRANDY PLAN AS A PERMANENT REMEDY

Appellants argue (Br. 47-49) that the district court erred in adopting the modified De Grandy plan as a remedy. They first assert (Br. 48) that the district court did not give them an opportunity to introduce their own remedial plan. That assertion is inaccurate. The district court permitted appellants to introduce two remedial plans. J.S. App. 68a-69a. Appellants do not take issue with the district court's conclusion that neither of those plans adequately remedied the violation the court found. See *id.* at 68a-70a.

Appellants next contend (Br. 48-49) that the court's remedial plan interferes with state policy more than necessary to remedy the violation, because it deviates from the State's plan in areas outside of Dade County. The district court found those adjustments to be both minimal and necessary to comply with one-person, one-vote requirements. J.S. App. 70a-71a.

Although appellants have not demonstrated that the district court's findings concerning the remedial plan are clearly erroneous, they do argue with considerable force that the district court's proceedings were inadequate, because they did not afford appellants an adequate opportunity to litigate issues concerning the effects of the modified De Grandy plan outside Dade County. See Br. 48-49. Specifically, they point out that they did not receive the modified De Grandy plan until the beginning of the remedial hearing, that the proponent of the plan addressed the court in a narrative fashion from the podium, and that they had no opportunity to cross-examine him.

We agree with appellants that the district court did not conduct the kind of remedial proceeding that should precede the adoption of a permanent remedial plan. To be sure, the district court was required to act expeditiously if it was to afford relief in time for the upcoming elections. Moreover, appellants complicated the district court's task when they introduced two remedial plans that failed to remedy the violation and then refused to accept (until after the court had reached its decision) another alternative proposed by the United States, under which they would have had the opportunity to draw a new plan that incorporated the 11 majority-Hispanic districts proposed by the De Grandy plan into the State's plan as appellants saw fit. See pp. 7-8, *supra*. In those circumstances, the district court did not abuse its discretion in imposing the modified De Grandy plan for the 1992 elections. See *Upham* v. *Seamon*, 456 U.S. 37, 44 (1982) (per curiam) (when elections are imminent, district court has authority to order elections to be held in accord with plans "that do not in all respects measure up to the legal requirements").

The district court did not, however, simply impose the modified De Grandy plan for the 1992 elections; it imposed that plan for post-1992 elections as well. We agree with appellants that the district court should not have taken that action without first conducting a more complete (and less hurried) proceeding to determine whether the modified De Grandy plan disrupted state policy more than necessary to remedy the violation. Accordingly, to the extent that the district court's judgment imposes the modified De Grandy plan for post-1992 elections, it

should be vacated and the case should be remanded for further remedial proceedings.[18]

CONCLUSION

The district court's finding of liability should be affirmed. The district court's judgment should be vacated as to the remedy, and the case should be remanded for further proceedings on the question of the proper remedy for post-1992 elections.

Respectfully submitted.

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[18] In the United States' appeal from the district court's judgment concerning the Florida Senate, we similarly argue that the district court erred in adopting the State's plan on a permanent basis without affording the United States and the De Grandy plaintiffs a full opportunity for a hearing on the remedial issues. See 92-767 & 92-593 U.S. Br. 15-16, 18-19.

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BOLLEY JOHNSON, *et al.*,
Appellants,

v.

MIGUEL DE GRANDY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

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v.
MIGUEL DE GRANDY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

REPLY BRIEF OF APPELLANTS

Neither the De Grandy Appellees nor the United States dispute that Senate Joint Resolution 2-G ("the State Plan") will afford Hispanics, who constitute 45% of the voting age population of the 20-District Dade County area, an opportunity to elect their preferred candidates in at least 9 of the 20 districts (or 45%). The United States does not dispute that the maximization theory of Section 2 liability—on which the district court's judgment was clearly based—is wrong as a matter of law. The United States also concedes that proportional results in the Dade County area would negate liability if the allegations of vote dilution were confined to that area.[1] Thus, notwithstanding the De Grandy Appellees' continuing plea for maximization, there is virtually no doubt that the district court's finding of vote dilution in the Dade County area must be reversed as a matter of law.

For that reason, the United States devotes most of its brief to arguing that appellees proved Hispanic vote dilution throughout the State of Florida, not merely in Dade

[1] *See* **Brief of the United States (U.S. Br.) at 19.**

County. Appellees, however, cannot prevail on this alternative ground because their statewide theory of liability is wrong as a matter of law: it demands "local" maximization of minority districts based on geographically remote and dispersed minority residents whose electoral opportunities are wholly unaffected by the way districts are drawn in the local area. The statewide theory is also insupportable on the facts, both because appellees never attempted to prove dilution outside Dade County and because the State Plan affords Hispanic *citizens* statewide proportionality.[2]

I. THE DISTRICT COURT'S JUDGMENT CANNOT BE AFFIRMED ON THE GROUNDS SET FORTH IN ITS OPINION.

Despite the United States' concessions, the De Grandy Appellees argue that Section 2 requires States to maximize the number of districts in which a minority class can elect its preferred representatives even if, as here, the class would exceed proportional representation under that standard. *See* De Grandy Br. at 22-24. This argument—although having the virtue of fidelity to the case appellees sought to prove at trial and the rationale of the district court's decision[3]—cannot be reconciled with the statu-

[2] This Court need not reach the remedial issues because the district court's liability determination should be reversed. In any event, the United States agrees that the district court's remedial order must be vacated. And while the De Grandy Appellees have not acquiesced in a remand, they offer no substantial argument in defense of the remedial order. Thus, the remedial issues will not be addressed further in this reply.

[3] The district court found the State Plan in violation of Section 2 "in that the plaintiffs have shown that more than nine Hispanic districts may be drawn." VIII Tr. 82. That result was based entirely on a comparison of the State Plan with an alternative plan expressly designed "to create the maximum number of Hispanic districts in Dade County." II Tr. 184 (testimony of Daryl Reaves); *see also* Affidavit of Dario Moreno, U.S. Exh. 45, at ¶ 51 (State plan "fail[s] to create the maximum number of majority minority districts"); *id* at ¶ 59 ("the De Grandy plan . . . maximizes the number of minority majority seats in South Florida").

tory language of Section 2 or with this Court's precedents. Nor can appellees' unyielding mandate for maximization be disguised by their general reference to the "totality of the circumstances" that supposedly exist in Dade County. The simple fact is that those circumstances *resulted* in Dade County's Hispanic voters having the same opportunity as everyone else to elect representatives of their choice. That is all Section 2 requires.

Appellees acknowledge that *Gingles* did not establish a maximization standard for vote dilution cases involving single-member districts, but argue that "[w]hat might have been controversial in *Gingles* is now settled law," as a result of *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993). *See* De Grandy Br. at 24. *Voinovich*, however, held only that proof of the *Gingles* preconditions is *necessary* in cases challenging single-member districts. Because the plaintiffs in *Voinovich* failed the "necessary" test, the case plainly does not establish that proof of the *Gingles* preconditions is *sufficient* to establish vote dilution in a challenge to single-member districts.[4]

As appellants demonstrated, proof of the *Gingles* preconditions simply does not make out a *prima facie* case of vote dilution in the single-member context. The *Gingles* preconditions are plainly relevant in the single-member context because they establish causation, *see Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993), but they cannot play the same role they do in multimember district cases.

[4] The Court's recent summary affirmance in *African American Voting Rights Legal Defense Fund, Inc. v. Blunt*, 113 S. Ct. 1809 (1993), also contradicts appellees' claim that the maximization standard is "settled law." According to the United States, the summary affirmance did not necessarily decide any issues on the merits because the appellees raised several technical and procedural challenges to the jurisdictional statement. *See* U.S. Br. at 23 n.5. But the appellees did not move to "dismiss or affirm" the district court's judgment: they moved solely to *dismiss* and raised *only* objections to the form of the jurisdictional statement. The Court did not dismiss the appeal; it affirmed on the merits notwithstanding the alleged technical deficiencies of the jurisdictional statement.

See Voinovich, 113 S. Ct. at 1157 ("the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim"). Under *Gingles*, a plaintiff class might well be able to demonstrate that additional single-member districts could be created, even though the challenged districts already afford proportional representation. *See* Brief of Appellants at 24-26.

In order to make out a *prima facie* case, plaintiffs must also prove that they are not on equal footing with the rest of the electorate. If there is "parity between votes and representation," then, by definition, the group has an equal electoral opportunity. *See Davis v. Bandemer*, 478 U.S. 109, 125 n.9 (1986). Thus, to allege a violation of Section 2, plaintiffs must show a substantial disparity between the minority class's percentage of the voting population and their level of electoral success, as well as the existence of the *Gingles* preconditions, which establish that the State's plan is to blame. *Cf. Thornburg v. Gingles*, 478 U.S. 30, 99-100 (1986) (O'Connor, J., concurring) ("[t]he court must find that even substantial minority success will be highly infrequent under the challenged plan before it may conclude, on this basis alone, that the plan operates to cancel out or minimize the voting strength of the racial group" (quotation omitted)).

In this case, appellees have conceded they cannot prove such a disparity within the 20-district Dade County area in which they alleged, and sought to prove, Hispanic vote dilution.[5] Because they cannot make that showing, "Section 2 simply does not speak to the matter." *Voinovich*, 113 S. Ct. at 1149.

[5] The United States concedes that an assessment of the plan can "be based on the likely effects of a plan that has not yet been put into effect, just as it can be based on the actual results of past elections." U.S. Br. at 19. As this concession indicates, there is no merit to the argument of the De Grandy Appellees and *amicus* the Lawyers Committee for Civil Rights, that proportionality cannot be assumed given alleged past underrepresentation of Hispanics. *But see* note 7 *infra*. Here, there is no dispute—and the district court found—that the State Plan will permit the election of at least 9 Hispanic-preferred candidates in Dade County during the life of the plan, and 9 Hispanic-preferred candidates were elected in 1992. *See* Brief of Appellants at 3.

Ignoring the compelling numerical *results* under the State Plan, appellees counter that the "totality of the circumstances" somehow justified the district court's conclusion. *See* De Grandy Br. at 22; U.S. Br. at 16-18. That argument misconceives the "totality of the circumstances" language in Section 2. The "totality of the circumstances" is not a *standard* for measuring vote dilution. Rather, it is a statutory directive concerning what evidence should be considered in determining whether vote dilution has occurred. It thus adds nothing to appellees' argument because it cannot independently justify a maximization requirement. Absent substantially unequal results, no basis exists for a finding of dilution under *any* circumstances.

Indeed, the centerpiece of appellees' "totality" argument—alleged "fragmentation" and "packing" of Hispanic voters in Dade County—is nothing more than a reformulation of appellees' maximization standard. As used by appellees, "fragmentation" and "packing" are simply pejorative labels for a legislature's decision not to create a minority district that could have been created. Every redistricting choice, of course, "fragments" some populations and "packs" others. That is why the ultimate question in a vote dilution case is not whether fragmentation or packing can be said to have occurred in some abstract sense, but whether minority and majority voters in the same geographic area have been, relatively speaking, "fragmented" or "packed" in like measure.[6]

Nor can the "circumstances" of relative socio-economic disadvantage and the "fear of language-based discrimination" establish a Section 2 violation absent a showing that the challenged districts produce unequal results. If,

[6] Appellees did not allege, and the district court did not find, that this alleged "fragmentation" and "packing" was intentional invidious discrimination.

irrespective of alleged disadvantage and discrimination, Hispanic voters in Dade County can elect preferred candidates at levels proportionate to the level of the Hispanic voting population, then no vote dilution has occurred. Indeed, that is precisely what the Court held with respect to District 23 in *Gingles*. 478 U.S. at 77 (plurality opinion); *id.* at 102 (O'Connor, J., concurring).[7]

Congress's command to consider "the totality of the circumstances" does not invest a district court with wide discretion to improve levels of minority electoral success whenever such improvement is possible. Yet that is what the district court did here. *Gingles* itself makes clear that vote dilution is shown only if "under the totality of the circumstances" the challenged electoral mechanisms "result in *unequal* access to the electoral process." 478 U.S. at 46 (emphasis added). The "totality of the circumstances" prove vote dilution only when they show " 'strong indicia of lack of political power and the denial of fair representation.' " *See Gingles*, 478 U.S. at 98 (O'Connor, J., concurring) (quoting *White v. Regester*, 412 U.S. at 766). That showing was not made here.

II. THE DISTRICT COURT'S JUDGMENT CANNOT BE AFFIRMED ON THE ALTERNATIVE STATEWIDE THEORY APPELLEES NOW ADVANCE.

The United States recognizes that the district court cannot be affirmed on the basis of its finding of vote dilution within the 20-district Dade County area. For that reason,

[7] Appellees' proof on these issues was doubtful in any event. Although appellees and their amici make much of the fact that no Hispanic was elected to the legislature from South Florida between 1882 and 1982, *see* Brief Amicus Curiae of the Lawyers Committee for Civil Rights at 9, that proves nothing about alleged exclusion of Hispanics from the political process. As of 1960, the Hispanic population of Dade County was minuscule. *See* Brief of Appellants at 8 n.16. That population has grown enormously in the past thirty years as a result of massive migration from Cuba and other Latin American nations. As these immigrants became citizens—a process that takes many years, as the United States notes, *see* U.S. Br. at 31 n.11—and were thus eligible to vote, they assimilated into public life. *See* Brief of Appellants at 31.

the United States now argues that appellees proved "Hispanic vote dilution throughout the State," which could be remedied only by creating two additional Hispanic districts in Dade County. This argument is wrong on the facts and as a matter of law.

A. The Record Will Not Support A Finding of Statewide Vote Dilution.

Even if appellees' statewide theory of liability were plausible as a matter of law—and it is not, *see* Point II.B. *infra*—statewide liability cannot be made out on the facts of this case.

As this Court recently explained:

> racial bloc voting and minority-group political cohesion never can be assumed, but specifically must be proved in each case in order to establish that a redistricting plan dilutes minority voting strength in violation of Section 2.

Shaw v. Reno, 1993 WL 224459 at *13 (U.S.N.C. June 28, 1993); *see also Growe*, 113 S. Ct. at 1085. This unyielding requirement furthers two critically important values of constitutional stature. First, it prevents unwarranted federal court intrusion into the core state function of reapportionment. Second, it assures that Section 2 liability will not be based on "impermissible racial stereotypes" that "members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw v. Reno*, 1993 WL 224459, at *10. For these reasons, plaintiffs must prove the *Gingles* preconditions for the *entire area* in which they allege vote dilution. An allegation of statewide vote dilution must be supported by a showing of the *Gingles* preconditions on a *statewide* basis. Indeed, when plaintiffs pursue a statewide case, statewide proof of the *Gingles* preconditions is "all the more essential" because such a theory would appear to rest on precisely the untenable stereotypes criticized in *Shaw*. *See Growe*, 113 S. Ct. at 1085.

Appellees have not even remotely made the requisite showing here.

Far from proving a claim of statewide vote dilution, appellees expressly *abandoned* it, and limited their proof to the Dade County area. The De Grandy Appellees candidly acknowledge this fact in their brief: "counsel stated on the record that the evidence of vote dilution would be presented only with regard to Dade County," and the proof was "limited to the South Florida area." De Grandy Br. at 27. The United States said the same thing at trial, resisting a directed verdict on the ground that the evidence "establish[es] a prima facie case of vote dilution *against Hispanic voters in the Dade County area*." III Tr. 193; J.A. 280 (emphasis added); *see* III Tr. 194-95 (United States has "demonstrated . . . political cohesion . . . *in Dade County*," and that "there is a white bloc vote *in Dade County*" (emphasis added)). Indeed, Appellees themselves voluntarily sought dismissal of any vote dilution claim involving Hispanics outside Dade County. III Tr. 215. In granting the motion, the district court made plain that it was "conforming the pleadings to the evidence." III Tr. 214.[8] Having chosen Dade County as their frame of reference, appellees are not free to change it in this Court. *Brown v. Thomson*, 462 U.S. 835, 846 (1983).

[8] The only indication in the record that appellees pursued a statewide case at trial are isolated remarks by counsel for the United States at closing argument—to the effect that "this case is not about Dade County." Those remarks cannot help appellees. Statements of counsel are no substitute for proof of the *Gingles* preconditions, and counsel had no power to revive claims previously abandoned.

In any event, counsel's statements have nothing to do with whether vote dilution had been proven on a statewide basis. Counsel's argument was made during closing arguments on the Senate portion of the trial. The Senate had claimed that additional Hispanic Senate districts would lessen opportunities for African-Americans and would require unnaturally elongated districts stretching far to the north and west of Dade County, and that Section 2 does not require the creation of such districts. The statements of counsel now quoted by the United States were plainly intended to rebut the particular, narrow compactness defense raised by the Senate.

In accordance with these rulings and representations, the record is barren of evidence to support a finding of statewide vote dilution. Most significantly, the district court's lengthy opinion contains *no* findings respecting Hispanic political cohesion or bloc voting in areas of Florida other than Dade County. To the contrary, the district court's findings were limited to Dade County. *See* 92-519 J.S. App. 44a-53a.[9]

To the extent appellees' experts addressed the issue of statewide cohesion, in fact, they gave testimony devastating to the case the United States now seeks to make. Dr. Moreno, for example, went to great lengths to demonstrate that Dade County's Hispanic population was politically *distinct* from other Hispanic communities. He explained that the Dade County "Cuban vote stands in stark contrast to that of other Latinos across the U.S." because Dade County Hispanic voters are extremely conservative and display an overwhelming and extremely strong allegiance to the Republican party. Moreno Aff. ¶ 26; J.A. 182.[10]

Dr. Thomas Hofeller gave affidavit testimony that the Hispanic population of Tampa—the largest Hispanic population center outside Dade County—"is predominantly Democrat and, as noted by the Department of Justice, is

[9] That is doubtless because appellees' experts limited their testimony on political cohesion and bloc voting to Dade County. Dr. Moreno testified that he had "not looked at any data outside Dade County," IV Cong. Tr. 317, and, specifically, that he had not "looked into" whether "Hispanics outside of Dade County are politically cohesive with the Hispanics inside Dade County." III Tr. 292. Dr. Lichtman likewise limited his testimony to issues of cohesion and bloc voting "for Dade County." Affidavit of Allan Lichtman, Exh. 46, III Tr. 106; J.A. 201-02.

[10] *See also* II Tr. 16 (Dario Moreno) ("The Hispanics in Dade County are distinguished from Hispanics in the other part of the country by being more conservative and much more republican than other Hispanic groups").

cohesive with black voters." [11] He also testified that the substantial Hispanic population in Palm Beach County consisted of "primarily farm workers who traditionally vote Democratic, . . . are not of Cuban heritage and vote in a cohesive pattern with the black community with whom they share similar economic interests." [12] The same Dr. Hofeller then noted the "serious degree of polarization between black and hispanic voters in Dade County," and urged that every effort be made *not* to join those two populations in the same districts.[13] This evidence alone precludes any inference of statewide Hispanic political cohesiveness.

The only "evidence" of statewide Hispanic cohesiveness the United States can muster from the voluminous record is a single sentence in the district court's opinion respecting congressional redistricting, in which appellants allegedly concede that "Hispanics were generally cohesive throughout the State." U.S. Br. at 33. The United States does not quote the language memorializing this purported concession, but merely cites to "92-519 J.S. App. 79a." [14] The only remotely relevant language on that page is the sentence "[t]he parties agree that racially polarized voting exists throughout Florida to varying degrees."

On its face, the sentence reflects agreement that racially polarized voting in Florida *varies* from region to region across the State—not that Hispanics are cohesive throughout the State. But even if voting were racially polarized across Florida to a significant degree,[15] that fact would

[11] Affidavit of Thomas B. Hofeller at 7; J.A. 164.

[12] Hofeller Aff. at 10-11; J.A. 167.

[13] *Id.* at 9; J.A. 166. *Se also* III Tr. 35-36 (Testimony of Allan Lichtman) ("black and Hispanics in Dade County are not jointly cohesive"); J.A. 369.

[14] U.S. Br. at 33.

[15] Findings in the congressional portion of the case do not establish the requisites of a Section 2 violation. As the court explained, "[t]he congressional inquiry was different from the inquiry in this Section 2 case because in the former, we were merely 'considering' Section 2 when formulating districts, while here we are presented with a specific challenge to the Florida plan." 92-519 J.S. App. 39a n.27. Nor does any evidence submitted during the congressional proceedings establish statewide Hispanic political cohesion. The statement by appellants' expert, Dr. Lisa Handley, that "the majority of Hispanics tend to vote for Hispanics"—to which the United States points as additional evidence for its statewide case—was made in reference to a single Congressional district.

not establish cohesion between Hispanics in North Florida and Hispanics in Dade County. For example, if the majority white population in North Florida were conservative and the Hispanic population liberal, voting might be racially polarized, but the liberal Hispanic voters in the northern part of the State would have little in common with the distinctively conservative Dade County Hispanic population.[16]

Appellees have also failed to demonstrate that bloc voting usually defeats Hispanic-preferred candidates on a statewide basis. The record contains *no* evidence indicating that Hispanic-preferred candidates outside of Dade County are usually defeated by the votes of a unified majority. To the contrary, the record confirms that Hispanic voters in Tampa have not suffered vote dilution because those voters have repeatedly elected a Hispanic to the House. IV Tr. 43. Proof of bloc voting in Dade County does not suffice because the "inquiry into the existence of vote dilution . . . is district specific." *Gingles*, 478 U.S. at 59 n.28. Indeed, "racial voting statistics from one district are ordinarily irrelevant in assessing the

[16] The United States claims that its virtual representation theory relies on the idea that Hispanics will "tend" to agree with other Hispanics "on those issues of special concern to Hispanics." U.S. Br. at 24. This statement starkly demonstrates the stereotype which underpins the statewide virtual representation theory. *See Shaw v. Reno*, 1993 WL 224459, at *10. This assumption also undermines the political cohesion requirement in *Gingles*, by attempting to limit it to issues on which minority group members will ostensibly agree. As this Court has made clear, political cohesion cannot be assumed, *see Growe*, 113 S. Ct. at 1085, nor should it be circumvented by circular reasoning.

totality of the circumstances in another district." *See Gingles*, 478 U.S. at 101 (O'Connor, J., concurring).

In *Growe v. Emison*, this Court made clear that "a court may not presume bloc voting within even a single minority group," 113 S. Ct. at 1085, and reversed the district court on the ground that "the *Gingles* preconditions were not only ignored but were unattainable." *Id.* Because nothing in the record in this case demonstrates that the State Plan "thwarts a distinctive minority vote" on a statewide basis, *see id.* at 1084, the district court must be reversed for reasons identical to those set forth in *Growe*.

B. Appellees' Theory of Statewide Vote Dilution Is Wrong As A Matter of Law.

Quite apart from its many factual deficiencies, appellees' statewide liability theory fails as a matter of law. Their theory requires local maximization of Hispanic districts in Dade County in order to ensure that Hispanics in *other* parts of the State are adequately "represented." The theory thus confuses equal electoral opportunity, which Section 2 protects, with an entitlement to predetermined levels of legislative representation, which Section 2 disclaims.

By expanding the frame of reference to comprise the entire State, the United States plainly does not seek to protect the *right to vote* of the additional Hispanic voters who live outside the 20-district Dade County area. Neither the alleged deficiencies of the State Plan in Dade County nor appellees' proposed remedy will have any bearing on the effectiveness of their votes. Geographic dispersion is the sole "cause" of any hypothetical vote dilution they may experience. As *Gingles* makes clear, if "the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, *these minority voters* cannot maintain that they would have been able to elect representatives of their choice in the absence of the . . . electoral

structure." *Gingles*, 478 U.S. at 50 n.17 (emphasis added).

Indeed, the United States makes clear that the statewide theory does not protect the right to vote of Hispanics living outside Dade County; it ensures "virtual representation." *See* U.S. Br. at 24 ("The theory is . . . that House members elected by Hispanic majorities will represent the interests of Hispanics outside their districts . . . on those issues that are of special concern to Hipanics"). That theory is, however, at war with the express language of Section 2 that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). The disclaimer is crucial to effectuating "the balance struck by Congress in amending § 2." *Gingles*, 478 U.S. at 85 (O'Connor, J., concurring). Assuming *arguendo* that majority bloc voting results in the consistent defeat of Hispanic-preferred candidates outside Dade County, the "dilution" occurs entirely as a result of residential patterns. Thus, Section 2 can remedy this dilution only if the statute guarantees representation, rather than protection against state action that abridges the right to compete on an equal footing in the electoral process. That, however, is precisely what the disclaimer precludes.

Appellees' statewide theory also rests on the deeply troubling—and arguably unconstitutional—premise that "individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin" will "think alike, share the same political interests, and will prefer the same candidates at the polls," irrespective of the many differences in age, occupation, education, economic status, and distinct local interests. *Shaw v. Reno*, 1993 WL 224459, at *10. Appellees' theory also encourages "elected officials . . . to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether

antithetical to our system of representative democracy." *Id.* at 11.

Despite appellees' claims to the contrary, the *Gingles* compactness requirement must define the relevant population whose votes are arguably diluted. The compactness requirement is more than merely an inquiry into whether an additional minority district could hypothetically be created irrespective of all other concerns. Properly understood, compactness tethers the Section 2 analysis to a principle of equal electoral opportunity within the framework of our representative system of government. A plaintiff alleging Section 2 vote dilution must, therefore, identify a reasonably compact geographic area in which the alleged dilution occurs. That showing will serve to ensure both that the Section 2 claim involves *state-caused* dilution of minority voting strength, and that within the challenged area citizens are able "to relate to each other and their representatives and . . . representatives [are able] to relate effectively to their constituency." *Wilson v. Eu*, 1 Cal.4th 707, 719, 823 P.2d 545, 553 (1992) (describing function of compactness inquiry); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 649 (N.D. Ill. 1991).

Appellees seek to paper over the weakness of their statewide theory by equating its premises with those of appellants' so-called "proportionality defense." But appellees are simply wrong to contend that appellants' case "rest[s] on the premise that the interests of Hispanics outside the districts in which Hispanics are in the majority will be 'represented' in some measure by the House members from those districts." U.S. Br. at 24. Proportionality does not defeat a Section 2 claim because it ensures that *all* members of a protected class are adequately represented in the legislature. Proportionality defeats a vote dilution claim because a parity of votes and representation is compelling *evidence* that opportunities for the minority class to participate in the electoral process equal those of other members of the electorate.

Obviously, some Hispanic voters will be disadvantaged even though a districting plan produces proportional results. This occurs because they will not live in districts where they can consistently vote for a winning candidate, just as some number of Anglo and African American voters will likewise be unable to elect their preferred candidates. That is simply a fact of life in a single-member district system. A districting plan cannot be said to afford unequal electoral opportunity to a minority class if that class is advantaged and disadvantaged to the same degree as other members of the electorate. Thus, proportionality defeats a Section 2 claim for reasons having nothing to do with whether minority voters living outside minority-controlled districts are "virtually represented" in some fashion.

Nor is there merit to appellees' claim that anything less than a statewide frame of reference would create insuperable "practical difficulties." *See* U.S. Br. at 24-25. Plaintiffs simply must define, as part of their case-in-chief, the area where minority voters are sufficiently numerous and geographically compact and suffer from vote dilution. It may be that "[p]laintiffs will almost always be able to define an area in which there is not proportional representation, while defendants will almost always be able to define an area in which there is," U.S. Br. at 25, but courts should have no difficulty piercing such efforts at manipulation. This is in fact what courts routinely do when faced with Section 2 cases. *E.g., Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 360 (7th Cir. 1992) (court rejected plaintiffs' frame of reference as too small); *Nash v. Blunt*, 797 F. Supp. 1488 (W.D. Mo. 1992) (court rejected plaintiffs' frame of reference as too large), *aff'd mem.*, 113 S. Ct. 1809 (1993); *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989) (analyzing vote dilution in specific areas of the state where plaintiff alleged a lack of statewide proportionality). The inquiry is not substantially different from the kinds of judgments courts must make respecting the appropriate labor pool in Title VII disparate impact cases or the appropriate geographic market in Sherman Act

monopolization cases. *See e.g., Hazelwood School Dist. v. United States*, 433 U.S. 299, 311-12 & n.17 (1977). In this case, there were no "practical difficulties." Appellees identified a 20-district Dade County area as the relevant frame of reference and appellants defended the plan within that frame of reference.

C. Appellees Cannot Prevail Even Under A Statewide Theory of Liability Because The State Plan Affords Hispanic Citizens Proportional Representation On A Statewide Basis.

The United States has conceded that "if a plan had been designed to afford Hispanics representation in proportion to their numbers in the *citizen* voting age population, it would apparently have eight or nine Hispanic seats" because Hispanics constitute 7.15% of the citizen voting age population of Florida.[17] This concession should end the case because the State Plan indisputably provides more than proportional representation to the Hispanic *citizen* population of Florida.[18]

No remand is necessary because the proper disposition of this issue is clear. The text of Section 2 expressly protects against "denial or abridgement of the right of any *citizen* of the United States to vote." 42 U.S.C. § 1973 (a) (emphasis added). Under subsection (b), "a violation . . . is established . . . if it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of *a class of*

[17] Motion to Affirm in Part and Vacate in Part in No. 92-519, at 14-15.

[18] The United States argues that the defense of statewide proportional representation based on citizenship was not raised in the district court. U.S. Br. at 26. But the United States never advanced a theory of statewide liability until it reached this Court. Furthermore, the relevant Census Bureau data was transmitted to the Justice Department on June 8, 1992, more than two weeks prior to the date the United States filed its complaint. J.A. 238. Thus, at the time of trial, the citizenship data that would have conclusively proven statewide proportionality was available to the Department of Justice but was unavailable to the State of Florida.

citizens . . . in that its members have less opportunity than *other members of the electorate*." *Id.* § 1973(b) (emphasis added). Section 2 plainly protects the exercise of the franchise. It was enacted "to help effectuate the Fifteenth Amendment's guarantee that no *citizen's* right to vote shall 'be denied or abridged . . . on account of race, color, or previous condition of servitude'." *Voinovich*, 113 S. Ct. at 1154-55 (emphasis added); *see also McNeil v. Springfield Park Dist.*, 851 F.2d 937, 945 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989) ("those ineligible to vote have not experienced a dilution of their vote."). The statute thus requires that vote dilution be considered on the basis of those whose rights the statute protects—citizens.

Because only citizens are eligible to vote, a showing of statewide proportional results based on citizenship levels is conclusive proof that Hispanic voters enjoy a level of electoral opportunity at least equivalent to that of other members of the electorate. Plainly, Hispanic *voters* in the State of Florida have at least as much opportunity as other *voters* to elect representatives of their choice. A reapportionment plan affording this level of electoral opportunity cannot violate Section 2.

Appellees have advanced contrary policy arguments centered on the fact that Florida reapportions its legislative districts on the basis of total population. The short answer to these arguments is that the statutory language forecloses them. They are meritless in any event.[19]

The argument that use of citizenship to measure electoral opportunity will result in invidious discrimination against Hispanic non-citizens is factually implausible. In

[19] The United States notes, but does not argue, that, as a result of Florida's approach, "Hispanic citizens as a group have *less* representation—since their representatives must represent more *people*—than other citizens in Florida." U.S. Br. at 29 (emphasis in original). This is wrong. Because Florida reapportions on the basis of total population, each representative's district will contain approximately the same number of persons. Thus, every representative will represent the same number of people, and every person will have equal representation.

any event, it is an equal protection challenge to the use of total population for reapportionment in a State containing substantial numbers of non-citizens. Whatever its merits, the De Grandy Appellees chose not to raise it in the district court. It has nothing to do with how the comparative electoral opportunity of those who are eligible to vote should be assessed.

III. THE DISTRICT COURT'S FINDING THAT HISPANICS COULD CONSTITUTE THE MAJORITY OF THE VOTERS IN ELEVEN DADE COUNTY DISTRICTS IS CLEARLY ERRONEOUS.

The district court also must be reversed because it applied "erroneous legal tests . . . to essential findings of fact." *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 381 (1956). Under *Gingles*, plaintiffs must show that a minority class is "sufficiently large and geographically compact to constitute a *majority* in [the proposed] single-member district[s]." *Gingles*, 478 U.S. at 50 (emphasis added). Districts in which minority voters cannot "dictate electoral outcomes independently," but may "elect their candidate of choice" due to "sufficient cross-over from white voters" are influence districts, *not* geographically compact majority-minority districts that satisfy *Gingles*. *See Voinovich*, 113 S. Ct. at 1155.

The district court's finding that Hispanics could form an "effective Hispanic voting majority" in eleven districts was based on the testimony of appellees' expert, Dr. Allan Lichtman. Dr. Lichtman, however, did not testify that Hispanic voting age citizens would constitute a majority in *any* district. He admitted that he had not studied citizenship levels in Dade County.[20] III Tr. 73,

[20] In at least one other case, the Department of Justice, recognizing that citizenship levels are the crucial benchmark, has refused § 5 preclearance to a district where the population was 65% Hispanic, but the citizen voting age percentage fell below 50% Hispanic. *See* Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, to Bob Bass, March 30, 1992 (Castro County, Texas). A copy of this letter has been lodged with the Clerk of this Court.

J.A. 373. Rather, Dr. Lichtman concluded that "the 11 districts within the De Grandy plan . . . provide Hispanics a realistic opportunity to elect candidates of their choice," Lichtman Testimony, III Tr. 218, J.A. 376, in light of the substantial number of Hispanics (both citizen and non-citizen) *and* cross-over voting. Lichtman Decl. (June 30, 1992) at ¶ 2 n.1, J.A. 213 (crossover rate of 28.5%). *See also* Lichtman Testimony, III Tr. 80, J.A. 374. The district court thus found only that plaintiffs' proposed plan created eleven influence districts—not eleven majority Hispanic districts, as required by *Gingles*. Because the court applied an incorrect legal standard, this finding must be reversed as clearly erroneous.

IV. THE CLAIMS OF BOTH THE DE GRANDY APPELLEES AND THE UNITED STATES SHOULD HAVE BEEN BARRED.

Appellees assert that the Florida Supreme Court's reliance on written evidentiary submissions, rather than live witnesses or other evidence, undermines the preclusive effect of that court's judgment. U.S. Br. at 38-39; De Grandy Br. at 43-44. Federal courts, however, are bound to give state judgments the same preclusive effect that the state courts would so long as a party had a "full and fair opportunity" to litigate its claim. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982). To constitute a "full and fair opportunity," state proceedings need do no more than satisfy the minimum requirements of the Due Process Clause. *Id.* at 481. Florida courts plainly would grant preclusive effect to the judgment of the Florida Supreme Court despite the lack of a full evidentiary hearing. *See, e.g., Florida Patient's Comp. Fund v. St. Paul Fire and Marine Ins. Co.*, 559 So. 2d 195 (Fla. 1990); *Avant v. Hammond Jones, Inc.*, 79 S. 2d 423, 424 (Fla. 1955). Federal courts routinely give preclusive effect to state court decisions based solely on written evidentiary submissions. *See Kunzelman v. Thompson*, 799 F.2d 1172, 1177 (7th Cir. 1986) ("[a] full evidentiary hearing

is not always necessary to provide due process protection or a fair opportunity to litigate the issue.").

Moreover, in this case, appellees failed to avail themselves of the Florida Supreme Court's explicit offer of an opportunity to present additional evidence. *See* J.S. App. 120a. Thus, under both federal law and Florida state law plaintiffs received a full and fair opportunity to litigate their claims and the district court's refusal to accord the Florida Supreme Court's judgment preclusive effect was error.[21]

CONCLUSION

The district court should be reversed.

Respectfully submitted,

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[21] The United States is also barred by the *Rooker-Feldman* doctrine from bringing an independent Section 2 challenge in any court other than the Florida Supreme Court. *See Lapin v. Shulton, Inc.*, 333 F.2d 169, 172 (9th Cir.), *cert. denied*, 379 U.S. 904 (1964).

MOTION FILED
APR 20 1993

No. 92-519

IN THE

Supreme Court of the United States

October Term, 1992

T.K. WETHERELL, Speaker of the Florida House of Representatives, PETER R.WALLACE, Chairman of the Reapportionment Committee of the Florida House of Representatives, LAWTON CHILES, Governor of the State of Florida, ROBERT A. BUTTERWORTH, Attorney General of the State of Florida, and JIM SMITH, Secretary of State of the State of Florida,

Appellants,

v.

MIGUEL DE GRANDY, MARIO DIAZ-BALART, ANDY IRELAND, CASIMER SMERICKI, VAN B. POOLE, TERRY KETCHEL, ROBERTO CASAS, RODOLFO GARCIA, JR., LUIS ROJAS, LINCOLN DIAZ-BALART, JAVIER SOUTO, JUSTO LUIS POSO, ALBERTO CARDENAS, REY VELAZQUEZ, LUIS MORSE, ALBERTO GUTMAN, KAREN E. BUTLER, SGT. AGUSTA CARTER, JEAN VAN METER, ANNA M. PINELLAS, ROBERT WOODY, GINA HAHN, BILL PETERSEN, TERRY KESTER, MARGIE KINCAID and BROOKS WHITE and the UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Northern District of Florida

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS AND COMMUNITY RELATIONS COMMITTEE OF THE GREATER MIAMI JEWISH FEDERATION IN SUPPORT OF APPELLANTS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The American Jewish Congress and the Community Relations Council of the Greater Miami Jewish Federation seek leave to file this brief *amici curiae* in support of appellants.

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the political, civil and economic rights of American Jews and all Americans. To this end, it has long supported legislation and judicial action to eliminate discrimination in the franchise. As early as the 1940's, it supported federal legislation to eliminate discrimination in voting.

The Community Relations Committee (CRC) of the Greater Miami Jewish Federation is the advocate for the survival and security of the Jewish community both at home and

abroad. Through a broad coordinated program of activity, the CRC gives high priority to protecting democratic constraints, particularly the Bill of Rights; and fostering a plural democratic society in the United States. Founded in 1973, the CRC is committed to the values of Jewish tradition and the American democratic heritage.

The interest of the *amici* in this case is not one merely of support for the historically important principle that the government ought not to inject race or ethnicity into the electoral process. The issues raised have practical consequences for the Jewish community, which for complex demographic and historical reasons is particularly likely to live in close proximity to minority groups.

Starting with the redistricting challenged in *United Jewish Organizations*

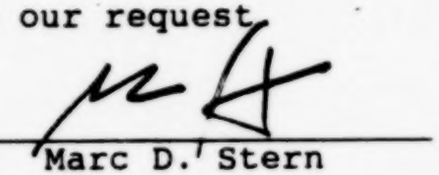
of Williamsburgh v. *Carey*, 430 U.S. 144 (1975), through last year's New York City and California redistricting, and now this case, Jewish communities which are physically compact, cohesive and which would ordinarily find themselves in one district, find themselves deliberately split asunder in the pursuit of majority-minority districts. As a result, Jews in these areas find themselves reduced to political impotence in local elections.

Jews, at least the Jews *amici* speak for, make no claim to proportional or group representation for themselves. Demographic changes, political boundaries, shifting political alliances, among other causes, may cause clusters of Jews to find themselves divided into two or more districts.

No one and no group, including Jews, has any constitutional or statutory right to a

districting configuration which enhances its influence. But it is one thing to say that a group must take its chances in the districting process, or that the districting process may not systematically suppress a political faction. It is quite another to say, as the District Court did here, that some racial groups have group rights to have their influence artificially enhanced and that others do not; indeed that some racial, religious or ethnic groups may be rendered politically impotent to leverage the political power of other groups. Because the statute was not intended to produce this blatantly unfair result, the judgment below ordering it should be reversed.

The appellants have consented to the filing of this brief. The other parties have not responded to our request.



Marc D. Stern

INTEREST OF THE *AMICI*

The interest of the *amici* is set forth in the motion for leave to file the brief *amici curiae*.

STATEMENT OF THE CASE AND FACTS

Although the facts are by and large not in dispute, the *Amici* adopts the Appellant's statement of the case and statement of the facts.

INTRODUCTION

The legislative redistricting which followed the 1990 decennial census was the first to be conducted under the 1982 Amendments to the Voting Rights Act, 42 U.S.C, § 1973 *et seq*. Those amendments impose an obligation on those charged with redistricting to ensure that minority voices are neither intentionally nor inadvertently submerged or silenced.[1]

The extent of this obligation is far from clear, as cases already decided by this Court this term or awaiting decision

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1. The scholarly literature is divided over the extent and wisdom of this obligation. Compare T. O'Rourke, The 1982 Amendments and the Voting Rights Paradox with B. Grofman & C. Davidson, What Is The Best Way to a Color Blind Society, both in B. Grofman & C. Davidson, Controversies in Minority Voting (1992). Some other theoreticians seem to have abandoned all pretense of seeking color-blindness through the Voting Rights Act and read the Act as a charter for minorities to organize themselves politically. See L. Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 Mich.L.Rev. 1077 (1991); L. Guinier, No Two Seats: The Elusive Quest For Political Equality, 77 Va.L.Rev. 1413 (1991).

as of this writing indicate. *Voinovich* v. *Quilter*, 1993 W.L. 50520; *Growe* v. *Emison*, 113 S.Ct. 1075 (1993); *Shaw* v. *Reno*, O.T. 1992, No. 92-357. But these cases only reflect a very small percentage of the explicitly racial districting which occurred during the past redistricting cycle.

Many legislative bodies, unsure of the exact scope of their obligations under the VRA, simply adopted the view that the Voting Rights Act in all circumstances requires the creation of majority-minority districts wherever it is theoretically possible to do so, no matter how uncouth the resulting district, or other costs to the political system[2]. Politicians act

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2. *Arduous Ritual of Redistricting Ensures More Racial Diversity*, Congressional Quarterly (October 24, 1992), p. 3355; see *Democrats Court Minorities To Counter GOP's Pitch*, Congressional Quarterly (May 4, 1991) p. 1103; *Racial Gerrymandering*, New York

(continued...)

this way to avoid financially and politically costly litigation and to avoid accusations of racism. In many instances, little or no effort was made to determine whether the *Thornburgh* v. *Gingles*, 478 U.S. 30 (1986) factors were satisfied or whether the political system was open to minorities. Rather, the search was for ways to create majority-minority districts as the touchstones of compliance with the VRA. *Cf*. Minnesota S.C.R. 2 (1991) (requiring maximization of minority power in redistricting).

Several factors give rise to the regnant uncertainty, not least of which is

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2.(...continued)
Times (July 16, 1991), at p. A18, col.1; *Letter from J.R. Dunne, Assistant Attorney General for Civil Rights to Judith Reed, Esq.* (June 19, 1991) (withholding pre-clearance from New York City council redistricting; noting that city held erroneously that only minorities can represent majority-minority districts); *Brown Says Uncertainty of Jewish Vote Dictated Drawing of District*, Los Angeles Times (September 20, 1992), at p. A3, col.1.

the fact that the 1982 Amendments were the product of a last minute compromise, dictated by political necessity in which the intense political pressure to overturn this Court's decision in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980) imposing an intent standard, and at the same time the political need to avoid openly legislating racial proportionality. The resulting compromise sometimes appears to be at war with itself, as Justice O'Connor observed in *Thornburgh* v. *Gingles*, 478 U.S. at 84.

Then, too, this Court's decision in *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977) ("*UJO*"), which upheld some consideration of race in districting, has been read broadly to sanction all forms of 'benign' racial districting at least if the asserted purpose is in compliance with the Voting Rights Act; see *Shaw* v. *Reno*, probable jurisdiction noted, 113 S.Ct. 653

(1992) (dismissing for failure to state a claim a "reverse discrimination" challenge to a majority minority district).[3]

Such a reading is a possible, but not necessary, reading of *UJO*. The narrowest reading of this Court's opinion in that case is that racial districting is constitutionally acceptable where necessary to avoid regression of minority voting strength, not that states are constitutionally permitted to maximize the political strength of minorities at the expense of other groups, the statutory standard the trial court used here.[4]

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3. *Cf. Ravich* v. *City of New York*, ____ F.Supp. ____, No. 90-Civ-5752 (S.D.N.Y. 1992) (invalidating N.Y. City charter provision requiring strict proportionately in appointments to districting commission.)

4. Moreover, *UJO* was decided before this Court's now lengthy, if wavering, line of decisions considering race conscious programs in a variety of contexts. Compare, *e.g.*, *Metro Broadcasting* v. *FCC*, 497 U.S. 547 (1990) with *City of Richmond* v. *Croson*, 488 U.S. 469 (1989). Some of those decisions (continued...)

Finally, it is the case that the first generation of Voting Rights Act ("VRA") cases involved exclusion of minorities from the political process. This generation of VRA cases, beginning with *Allen* v. *Board of Elections*, 393 U.S. 544 (1968), were variations on the "inexorable zero" to which this Court has referred in other civil rights contexts, *International Brotherhood of Teamsters* v. *U.S.*, 431 U.S. 324, 342, n.23 (1977) and which properly call forth stringent remedies. Cf. *Local 28, Sheet Metal Workers* v. *EEOC*, 478 U.S. 421 (1986) (hiring quota as remedy for flagrant employment discrimination).

4.(...continued)
suggest, but again do not require,further restriction on the use of race-conscious government actions than suggested by *UJO*. Others could be read to hold that because the Voting Rights Act is congressional legislation it is largely free of those restraints.

Whether those remedies are appropriate (or intended by Congress) in other cases where minorities are active and full participants in the political process is surely not finally determined by those early decisions. Indeed, there is indication in the Congressional Record that the sponsors of the Act intended the remedies to be flexible, guided by the principles of equity, and applied in response to the severity of the violation. 127 Cong. Rec. 14,138, June 17, 1982 (remarks of Senator Mathias).

It is true that some academic experts and prominent VRA litigators have read the Act as if it were a charter for minorities to eschew traditional political avenues and political organizations, and create a new race-centered politics.[5] As a reading

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5. See the articles cites in note 1, *supra*.

of these advocates' writing indicate, advocates of this view do not make any serious effort to demonstrate that the VRA was so intended by Congress.

There is also substantial conflicting evidence overlooked by proponents of this view. To take the most obvious example, the proviso against proportional representation, 42 U.S.C. § 1973(b), points in a very different direction but is often not mentioned at all by proponents of ever more stringent VRA remedies. See *e.g.*, L. Guinier, No Two Seats: The Elusive Quest For Political Equality, 77 Va.L.Rev. 1413 (1991); L. Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 Mich.L.Rev. 1077 (1991) (calling for proportionate interest representation); P. Karlan, Maps and

Misreadings, 24 Harv. Civ. C.R.-C.L. L.Rev. 173 (1989).

This case hinges on whether the Voting Right Act is a traditional anti-discrimination statute on the one hand, or serves as a charter for racial politics on the other. Because it is so clear that Congress intended the former interpretation, but that the court below adopted the latter, its judgment should be reversed.

I. THE VOTING RIGHTS ACT GUARANTIES MINORITIES AN OPEN POLITICAL SYSTEM, NOT ELECTORAL SUCCESS

A. Plaintiffs Have Not Carried Their Burden of Proof

This Court insists that "the federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements." *Voinovich* v. *Quilter*, 1993 W.L. 50520, at *7 (hereafter "*Voinovich*"). *Cf. Growe* v. *Emison*, 113 S.Ct. 1075 (1993). Florida's

House redistricting plan[6] was thus presumptively entitled to be accepted even though it was not the plan most favorable to Hispanics, unless it violated the VRA. *Voinovich* v. *Quilter*, *supra*. And because "Congress could not have intended the State to prove the invalidity of its own apportionment scheme," *Voinovich*, 1993 W.L. at *8, the plaintiff had the burden of proving that the state's House redistricting plan illegally diluted the Hispanic vote in southern Florida.

That is, plaintiff in this case was required to prove in that case that the legislature's plan, in light of all the

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6. *Amici* takes no position in regard to the challenge to the Senate redistricting plan at issue in *U.S.* v. *Florida*, No. 92-767 and *DeGrandy* v. *Wetherell*, 92-593, except to note that the problem of conflicting group claims presented in that branch of the case is a direct result of the trial court's interpretation of the Act as requiring maximum marshalling of minority political strength, which resulted in a clash of obligations that would not have existed under the standard we propose.

surrounding social, political and historical circumstances, was less open to Hispanic participation than to participation by other racial, ethnic or language groups in South Florida. Florida was surely under no obligation to defend its plan by proving that there was no other plan that would increase to a greater degree the political potency of Hispanics.

It was because there was no proof that elections in the Ohio legislature were not equally open to African-Americans that this Court in *Voinovich* rebuffed a challenge to Ohio's legislatively drawn plan. There, this Court rejected the argument that because there existed an alternative plan more favorable to African-Americans, the proffered plan was illegal. The unanimous decision in *Voinovich* stands unambiguously for the proposition that maximization of minority

political power or the bare possibility of drawing minority districts is not the relevant test under § 2.

It is unnecessary to decide in this case the question mooted by the parties here of whether vote-dilution should be measured with regard to voting age population, regardless of citizenship, as the trial court held [31a],[7] or whether the appropriate figure is those eligible to vote (*i.e.* citizens) as appellants contend. For present purposes, it is sufficient to accept the VRA figures used by the District Court. Even using these figures, the legislature's redistricting plan should have been upheld.

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7. All citations [___a] are to the Appendix to the Jurisdictional Statement of the *Wetherell* appellants in O.T. 1992, 92-519.

B. The Fact that Hispanics Enjoy Proportional Representation Defeats Their § 2 Claim

Under the plan proffered by the legislature (SJR 2-G) half (9 of 18) of the House seats at issue represent majority Hispanic districts. Approximately 49% of the relevant population is Hispanic (953,407/1,937,094) [44a]. Thus, even if no adjustments are made for the large number of Hispanics who are not yet of voting age (to say nothing of those who are ineligible to vote because they are not citizens), Hispanics as a group would have enjoyed slightly more than fully proportional representation under the legislature's plan. It therefore cannot be said that legislative races in South Florida were "not equally open to participation," 42 U.S.C, § 1973, by Hispanics.

Thornburgh v. *Gingles*, 478 U.S. 30 (1986), holds that a showing of electoral proportionality necessarily defeats a § 2 claim. This is not because the Act requires proportionality, an interpretation the statute itself disavows. 42 U.S.C. § 1973(b). Rather, electoral success is dramatic and conclusive proof that "the political processes are . . . equally open to participation by members of a class of citizens protected [by the Act]." 42 U.S.C. § 1973(b). As we demonstrate below, this phrasing was carefully chosen to focus on the structure and actual functioning of a given electoral practice, not simply on the outcome of that system measured exclusively on whether minorities enjoyed electoral success. See Point II *infra*.

Of all the factors which the courts are mandated to consider in evaluating

"totality of [the] circumstances," 42 U.S.C. § 1973(b), to determine whether, in the language of the statute "the political processes are . . . equally open . . . ," see S.Rep. No. 94-917 (1982) at pp. 28-29, reprinted in 1982 U.S. Code Cong. & Admin. News 177, 205-06, the only circumstance actually enumerated in the statute is the "extent to which members of a protected class have been elected to office" 42 U.S.C. § 1973(b), a factor here pointing decidedly in favor of upholding the Legislature's plan.[8]

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8. All nine of the districts designated for the Hispanic community under the legislature's plan put into effect under a stay granted by this Court, *Wetherell* v. *DeGrandy*, 113 S.Ct. 1 (1992), actually elected Hispanics to the Florida House of Representatives.

To the extent that minority electoral success facilitated by § 2 advances other goals, such as ensuring that minority concerns are considered and that openly racist conduct in the legislature is suppressed, see Abrams, Raising Politics Up: Minority Political Participation and § 2 of the Voting Rights Act, 63 N.Y.U.L.Rev. 449

(continued...)

The success of minority candidates is important not because the Act confers a substantive right to electoral success on protected classes, but because such success proves that the political process satisfies the statutory standard of being "equally open" to all. 42 U.S.C. § 1973. [emphasis added]

Electoral success demonstrates that the system does not embody open or hidden structural barriers to minority success and does not freeze into place *de jure* or *de facto* electoral or societal discrimination which "results in a denial or abridgment" of the right to vote. Success likewise demonstrates that without even more heavy-handed government intervention

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8.(...continued)
(1988), these goals are also fully vindicated by the Legislature's plan.

on a racial basis, minority voters can effectively make their voices heard.

Accordingly, where a political arrangement is demonstrably open to minorities, even if the three *Gingles* criteria exist -- that is, if there is a majority-minority district which can be drawn, if minority groups are politically homogenous and if voting is somewhat polarized -- no violation of the Voting Rights Act exists.

In *Gingles* itself this Court refused to sustain a finding of a § 2 violation in a North Carolina district in which minorities experienced substantial electoral success even without a majority-minority district, although it was possible to draw such a district.[9] That holding, with

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9. To be sure, the Florida plan has not yet evidenced sustained ability to allow the election of candidates of choice for the Hispanic community as did the North Carolina (continued...)

regard to a single district in *Gingles*, should surely be applicable to half the seats in Dade County as well.

II. THE LEGISLATIVE HISTORY REFUTES THE TRIAL COURT'S INTERPRETATION OF THE ACT

A. The Act Does Not Require Maximization Of Minority Voting Power

Notwithstanding the plain language of the statute, and the controlling decision in *Thornburgh* v. *Gingles*, *supra*, the trial court in this case found that it was necessary to divide up South Florida so as to create those two additional Hispanic

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9.(...continued)
district. That lack of sustained success will always be present in regard to new redistricting plans, but unless plans may never be changed, this is an unavoidable state of affairs in each state once every decade.

Florida's districting plan was carefully designed to provide for minority access to the political process. These lines may not guarantee Hispanic representation over the entire decade, but there plainly is no right to such a guarantee. And in the one election conducted since redistricting, the lines drawn worked precisely as predicted. See note 8, *supra*.

seats. This was required in the court's view merely because all three *Gingles* criteria could be satisfied in an additional two districts, not just the nine included in the state's plan.[10]

The proponent of the remedial plan ultimately adopted by that court, appellee DeGrandy, minced no words in explaining the political goals of the modified "Hispanic seat proposal." The plan, he said, was motivated by a self-serving desire to "boost our seats or minority seats more than they are in the [plaintiff's original] plan." [71a].

This it "should be done if it can be done" standard, *Solomon* v. *Liberty County*, 899 F.2d 1012, 1039 (11th Cir. 1990)

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10. The court was careful to note that its revised plan would not "adversely affect African-Americans." Apart from this statement, the impact the court's revised districting might have on non-Hispanics or non African-Americans was neither mentioned or elaborated on.

(Hill, J., concurring), is at war with the VRA as explained in the authoritative Senate Report, see *Gingles*, 478 U.S. at 43, and *id*. at n.7, and indeed throughout its legislative history.

The Act was intended to provide only a fair opportunity to participate in the political process, not to carve out a permanent exception to the results of the majoritarian political process. The VRA serves only to remove structural obstacles to minority participation, not to distort the system in their favor.

Neither the problem which Congress sought to solve through passage of the 1982 amendment to the VRA, nor one word of the legislative history even suggests, let alone requires, the interpretation of the Act adopted by the trial court, placing such a heavy racial thumb on the electoral scales. On the contrary, the opposition

to the revision of § 2 revolved around whether it could be construed to do just that. Those who sought to revise § 2 had to persuade their colleagues that proposed § 2 was not a vehicle for any form of mandated racially proportionate results.

Finally, as a practical matter, maximization of one group's power means the minimization of another's. This is so because seats cannot be apportioned with mathematical precision, so that maximizing minority representation must necessarily come at the expense of some other group. This fact of political life is wholly ignored in the District Court's opinion.

More importantly, districts whose purpose it is to elect officials of a particular racial or ethnic group are organized so that the majority group will be wholly dominant and beyond challenge. Its domination stems precisely from the

suspect grounds of racial or ethnic solidarity. Other groups are designedly politically irrelevant, nothing more than one person, one vote filler, all of whom are to be vicariously represented by whites elsewhere, without any thought to whether there is any commonality between whites.

B. The Problem Confronting Congress

The central problem confronting Congress in 1982 as it contemplated § 2 of the VRA was whether and how to respond to the plurality opinion in *City of Mobile* v. *Bolden*, 446 U.S. 55, 58-80 (1980). There, this Court held that a successful claim under § 2 of the VRA (as well as under the Fifteenth Amendment) required a showing of an invidious intent to disenfranchise a

protected group.[11] Critics of the decision complained chiefly of the difficulty of proving invidious intent, particularly in the case of electoral systems which were of hoary age.

The debate over the question of whether *City of Mobile* v. *Bolden* should be statutorily overruled was sharp, pointed and well-informed by partisans on both sides of the issue, particularly in the Senate. At no time did any party to the debate urge on the Congress the maximization standard adopted by the District Court in this case.[12] On the

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11. An alternative holding of the *Bolden* Court was that vote dilution did not violate either the Fifteenth Amendment or the VRA, 446 U.S. at 65, or § 2. There is no recorded congressional opposition to overturning this branch of the *Mobile* decision.

12. What follows draws on an independent review of the legislative materials, as well as on the excellent accounts of A.M. Thernstrom, Whose Votes Count: Affirmative Action and Minority Voting Rights (1987) (hereafter "Thernstrom, Whose Votes") and

(continued...)

contrary, throughout the debate the focus was on eliminating discrimination in the electoral process.

C. Proceedings in the House - Round 1

The intent/effect issue was not the major thrust of the House proceedings, which focussed on extending the pre-clearance provisions of § 2 and the bilingual provisions, 42 U.S.C. § 1973 b(f), of the Act. Nevertheless, several proponents of overruling *City of Mobile* v. *Bolden* did testify during the House Judiciary Committee hearings. Each repudiated any intent to endorse a proportionality requirement.

Former Assistant Attorney General for Civil Rights, Drew Days emphasized that the change proposed for § 2 was largely

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12.(...continued)
Judge Tjoflat's comprehensive concurring opinion in *Solomon* v. *Liberty County*, 899 F.2d 1012, 1021-37 (11th Cir. 1990).

evidentiary in nature. General Days testified that because the proposed revision drew largely on this Court's decisions in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971) and *White* v. *Register*, 412 U.S. 755 (1973), both of which rejected claims for proportional representation, the revised § 2 would not create a right to proportional representation. See Extension of the Voting Rights Act, Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary of the House of Representatives (Serial No. 24), Part 3, p. 2149.[13]

The House Judiciary Committee left the prior structure of § 2 largely intact, simply specifying a results test and

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13. Attorney General Days was seconded by a number of seasoned Voting Rights Act litigators at these hearings. See id. at 2037 (testimony of James Blacksher); id. at 2057 (testimony of Armond Derfner).

providing that the lack of proportionality did not itself constitute a violation:

> Section 2 of the Voting Rights Act of 1965 is amended by striking out "to deny or abridge" and inserting in lieu thereof "in a manner which results in a denial or abridgement of" and is further amended by adding at the end of the section the following sentence: "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section."

H.R. 3112, 97th Cong., 1st Sess. § 2, 127 Cong. Rec. 6565 (1981).

Further evidence that the Committee was not seeking to impose a maximization requirement, but simply to expand on the acceptable proof of illegal discrimination, is that it continuously referred to the need to prove discrimination. Thus, in its report, the Committee emphasized first that "discrimination

continued to plague electoral processes", see H.R. Rep. 97-227 at, e.g., 13, 14, 17, 18 (at large elections), 19 (gerry-mandering).

The Committee further explained the need for a reversal of *City of Mobile* v. *Bolden* in order to facilitate successful challenges to long-standing discriminatory practices not subject to § 5 pre-clearance. *Id.* at 28. The need to end discrimination is the *leit motif* of this section of the Committee Report's discussion of § 2. *Id.* at 28-31.

For all its emphasis on eliminating discrimination, the Committee was at pains to disavow any implication that the Act would, if amended, require proportionality precisely because the Committee did not equate non-discrimination with proportionality:

> The proposed amendment does not create a right of proportional representation. Thus, the fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population does not, in itself, constitute a violation of the section although such proof, along with other objective factors, would be highly relevant. Neither does it create a right to proportional representation as a remedy.

Id. at 30. The bill easily passed the House.

During the entire course of the House proceedings, the Reagan Administration took no position on § 2. A. Thernstrom, Whose Votes at 113-17. By the time the bill reached the Senate, however, the Administration announced its opposition to a change in § 2 on the ground that it would necessarily lead to proportional representation. *Id.* at 116; 1982 Congressional Quarterly Almanac, Voting Rights Act Extended, 373, 374 (1992).

D. The Senate Subcommittee On the Constitution - Round 2

When the bill reached the Senate, it was referred to the Subcommittee on the Constitution of the Senate Judiciary Committee, then chaired by Senator Orrin Hatch. After extensive hearings, which unlike the House Committee hearings provided a platform for both those who favored and opposed amending § 2, see A.M. Thernstrom, Whose Votes at 85-87; 120-30, the Subcommittee voted to leave § 2 intact. Proponents of amending § 2 denied in their testimony that the change was intended to, or would have the effect of, mandating proportional representation.

The Subcommittee's Report[14] explained that the revised version of § 2 posed an unacceptable risk of requiring propor-

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14. The Subcommittee Report is reprinted as an Appendix to the Senate Judiciary Report at p. 108; 1982 U.S. Code, Cong. & Admin. News at 278.

tional representation, notwithstanding the disclaimer that proof of a lack of proportional representation was not itself proof of a violation:

> However, under the proposed change in section 2, the right established is to a particular result and so, inevitably, much more will be required to provide an adequate remedy. The obligations of judges will require use of their equity powers to structure electoral systems to provide a result that will be responsive to the new right. Otherwise, the new right would be without an effective remedy, a state of affairs which is logically and legally unacceptable. [footnote omitted]

S.Rep. at 140, 1982 U.S. Code Cong. & Admin. News at 312. Moreover, the Subcommittee was not persuaded that the damage had been cured by the "disclaimer" language in the House-passed version of the revised § 2:

> The disclaimer provision will have virtually no practical significance in preventing the ultimate imposition of propor-

tional representation. In short, the disclaimer merely adds the necessity of proving, as an element of the new section 2 claim, one or more "objective factors of discrimination" that purport to explain or illuminate the failure to elect in numbers equal to the group's proportion of the population. The sub-committee finds this addition totally illusory as a bar to proportional representation since the courts and the Justice Department in the context of section 5 and elsewhere have already identified so many such factors that one or more would be available to fully establish a section 2 claim in virtually any political subdivision having an identifiable minority group.

S.Rep. at 143, 1982 U.S. Code Cong. & Admin News at 315.

E. The Senate Judiciary Committee - Round 3

The full Senate Judiciary Committee rejected both the House version, on the one hand, and the Subcommittee's rejection of any change in § 2 on the other. Its compromise language, largely crafted by Senator Dole (together with Senators

Mathias and Kennedy), ultimately became the new § 2.

The compromise had two key elements. First, instead of the bare addition of explicit sanction for a results test, the compromise spelled out that a court was to look to all the circumstances surrounding the use of a particular electoral device or practice, not just to who was elected. The courts were to judge the openness of the system, not the race or ethnicity of the successful candidates.

Second, the ban on claims of proportional representation was strengthened. Unlike the House version, which merely would have barred claims for pure proportional representation, unaccompanied by other evidence, the compromise flatly declared that no group is entitled to proportional represen-tation.

The Senate Judiciary Committee's Report was at great pains to explain that the compromise did not embrace any system of proportional representation, and that the compromise rejected claims that any disparities between the number of officials of a particular race or ethnic group elected[15] and the protected group's numerical strength itself stated a claim.

On the contrary, the Report emphasized the compromise's deep roots in

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15. In *Thornburgh* v. *Gingles*, the plurality opinion of Justice Brennan refers to the election of candidates of choice, and rejected any identification of this concept with an identity between group and representative(s), a position apparently rejected by Justice White, 478 U.S. at 83. In the real world, candidates of choice are almost always thought of as being of the same group. Thus, in New York City, a white incumbent was deliberately drawn out of her district because the districting commission believed that a white could not under the VRA represent a minority district. See, *Alter* v. *Macchiarola*, 91-Civ-2232 (E.D.N.Y.) (pending).

earlier decisions of this Court,[16] each of which explicitly repudiated any claims of proportionality; as well as decisions of the former Fifth Circuit,[17] which likewise disclaimed any requirement of proportional representation.

Instead, the full Committee's Report emphasized both that the effects test was designed to deal with the problem of discrimination, whether intentional or otherwise, see, e.g. S.Rep. at 19, 20, 22, 28, 30, 37, 39, 40, 43. 1982 U.S. Code Cong. & Admin. News at 196, 197, 199, 206, 207, 215, 217, 218, 221, and that a claim could be made out only after a searching inquiry into the functioning of a political unit to determine whether, under the

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16. *White* v. *Register*, 412 U.S. 755, 765-66 (1973); *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971).

17. *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

"totality of the circumstances," political life was tainted with discrimination, not merely whether there is some raw, statistical imbalance. S.Rep. at 23-34, 1982 U.S. Code Cong. & Admin. News at 204-212.

The Senate Judiciary Committee report's list of eight factors (cited in *Thornburgh* v. *Gingles*, 478 U.S. at 44), was to guide courts in assessing whether a challenged electoral arrangement effectively discriminated against minorities in the electoral system, not to enable them to determine whether minorities enjoyed proportional representation, much less maximization of minority political power. The spokesperson for the Leadership Conference on Civil Rights, the leading private advocate for the revised § 2 concurred in this assessment. A.M. Thernstrom, Whose Votes at 125-27.

Because of this statutory insistence on a searching review of the 'totality of the circumstances,' the Committee asserted that the Dole compromise "will not present the dangers raised by those who have opposed it -- a requirement of quotas or an all-out assault on at large elections systems in general." S.Rep. at 27, 1982 U.S. Code Cong. and Admin. News at 204-05.

Moreover, the Committee was at pains to emphasize that the burden of proving discrimination was on the plaintiff. It expressed the view that this allocation of burdens of proof would prove to be an onerous burden on plaintiffs, thus further preventing implementation of any system of proportional representation. S.Rep. at 33, 1982 U.S. Code Cong. & Admin. News at 211.

The Committee dealt directly with the claim advanced by the Subcommittee Report

and the Reagan Administration that an effects test would lead to racial quotas:

> Under the results test, the cases never required proportional representation, and invariably repudiated it. This conclusion has not been challenged by any of the testimony. This rejection of proportional representation as the standard for legality under the results test is explicitly incorporated into the statute by the disclaimer, based on the holding in *White*. The disclaimer squarely states that the Section creates no right to proportional representation for any group.

S.Rep at 33, 1982 U.S. Code Cong. & Admin. News at 210-211.

F. The Full Senate - Round 4

The final hurdle for the bill was the Senate itself, where several Senators engaged in a filibuster against it. Again and again supporters of the compromise argued that there was no possibility of the bill leading to quotas or proportionality; instead, they insisted, to use

Senator Dole's phrase, that it provided only "equal access to the political process. 127 Cong. Rec. 14,139-140 (June 17, 1982). See also, *id.* (remarks of Senator Grassley); *id.* at 14,135-36 (remarks of Senator Kennedy) ("equal opportunity to participate"); *id.* (remarks of Senators Mathias and Heflen); *id.* at 14138 (remarks of Senator Mathias); *id.* at 14090 (remarks of Senator Hatch). The House quickly accepted the Senate's version after perfunctory debate.

G. What Hath Congress Wrought?

The statutory proviso barring claims of proportionality, when read *in pari materia* with the more detailed description of the elements of claim of illegal discriminatory effects embodied in the Senate's compromise version of § 2, does more than just bar direct claims for proportional representation. Rather, it

reaffirms that the Voting Rights Act is a traditional anti-discrimination statute, one which requires some showing of being disadvantaged in the electoral process because of one's race, ethnicity or language. In other words, it requires proof of cognizable discrimination.

A redistricting plan such as that proposed by the Florida legislature, under which a group enjoys a full measure of political power, hardly disadvantages or discriminates against that group. Since a claim by Hispanics to 50% of the legislative seats in South Florida because they comprise half of the population would have to be dismissed at the outset, it should follow that a claim for more than a proportional share should likewise not be entertained, much less upheld.

III. THE THREE *THORNBURGH* v. *GINGLES* CRITERIA ARE THRESHOLD REQUIREMENTS, NOT ALONE SUFFICIENT TO SUSTAIN A CLAIM OF VIOLATION

A. The Act Requires Attention to the Totality of the Circumstances, Not Just Three Core Factors

Of the various factors listed by the Senate Judiciary Committee report to be utilized by the courts in thoroughly investigating the political ecology of a community -- a list the Committee emphasized was not exhaustive -- the District Court relied almost exclusively on three core factors highlighted in *Thornburgh* v. *Gingles* [28a-30a] -- that is, whether the minority group is "sufficiently large and geographically compact to constitute a majority in a single member district; (2) whether it is politically cohesive; and (3) whether the white majority votes sufficiently as a block to defeat minority political

interests. What these three factors have in common is that they emphasize the importance of the creation of majority-minority districts as the acid test of compliance with the Voting Rights Act.

The court therefore did not undertake the searching analysis of the availability to Dade County Hispanics of other forms of effective access to the political process. Surely, though, it is possible to be politically effective, even dominating, without constituting a majority of any particular district. The National Rifle Association is a conspicuous example.

In taking this statistical shortcut, the District Court substituted what amounted to a thinly-veiled, if objective, proportionality analysis for the more searching, albeit more subjective, test of political effectiveness which the Congress mandated in adopting the 1982 Amendments.

As we have demonstrated in Point II, *supra*, the Congressional insistence on this searching inquiry into political realities was central to the compromise which led to passage of the amended § 2.

The District Court's treatment of the last factor in its truncated analysis -- political cohesiveness -- is particularly telling of its vision of minority dominated districts as <u>the</u> acid test of compliance with the Voting Rights Act.

There was no finding that the various Hispanic subgroups shared a common agenda on the issues which were determinative of votes for members of the Florida House [45a]. There was evidence of substantial political differences between the various subgroups comprising Dade County's Hispanic population. To be sure, there was also contrary testimony that Hispanic groups share common viewpoints on several

important issues, notably those involving language [46a-47a].

Rather than explain how it chose one or the other of these versions of political truth, the District Court concluded, without weighing these competing political facts of life as they affected election outcomes, that there were sufficient common interests to satisfy the *Gingles* test [47a].[18] What that might be other than the bare fact of a common language is left unclear and unstated.

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18. There was testimony (which the District Court credited) that despite the fact that Puerto Ricans and Cubans do not share a common party affiliation, they were cohesive because Hispanic Democrats (*i.e.* Puerto Ricans) will vote for Hispanic Republicans (*i.e.* Cubans) over an 'Anglo' candidate [47a]. Contrary to what the District Court believed, this testimony does not prove political cohesiveness. Instead it proves mere racial or ethnic cohesiveness which under the trial court's approach is rewarded by the VRA. These cannot be the same thing if Congress' disclaimer of any interest in enacting a principle of proportional representation is to be given any weight. That the trial court conflated the two is indicative of that court's fundamentally flawed approach to the VRA.

Of the remaining factors listed by the Senate Committee, the District Court mentioned only the existence of discrimination in South Florida, both in the past and present. With respect to Hispanics, the court pointed only to "Hispanic fear of anti-Spanish backlash" [53a], including a reference to an affidavit listing some unspecified number of instances of language-based discrimination against Hispanics.

Significantly, the court did not point to any evidence that these fears of backlash were substantially justified. One is also left to speculate about how wide-spread this pattern of discrimination was, whether instances of discrimination were redressed promptly when identified, whether discrimination had any measurable impact on the electoral process, and whether it was sufficiently widespread and

significant to justify the invalidation of a plan creating nine Hispanic seats in favor of an even heavier electoral tilt towards Hispanics.[19]

Discrimination is relevant to VRA analysis not because in the manner of original sin it taints a jurisdiction forever, *City of Mobile* v. *Bolden*, 446 U.S. at 74. Rather, it should be significant if, and only if, the lingering effects of prior discrimination have a current adverse impact on the ability of minority groups to effectively exercise political power on an equal basis with others. See S.Rep. at 33, 1982 U.S. Code Cong. and Admin. News at 211 (rejecting charge that revised § 2 presumes that race

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19. As further evidence of discrimination, the District Court also pointed to the fact that several counties in Florida were subject to Justice Department pre-clearance. Dade County was not one of those counties.

is predominant determinant of electoral choices).

The District Court, however, made no findings tying the existence of prior or current anti-Hispanic discrimination in Dade County to the present inability of that community to exercise effective political power. Instead, it conferred almost talismanic effect on the existence of some unquantified amount of anti-Hispanic discrimination.

Equally significant are those factors the District Court did not address. It did not discuss whether there were structural barriers to full and effective Hispanic participation, such as unusually large districts or a candidate slating process controlled by the white majority. The court below likewise wholly failed to consider whether non-Hispanic office-holders were responsive to Hispanic

concerns, and whether Hispanics held other offices in the area. They do -- the Mayor of Miami, the largest city in Dade County, as well as many other local officials in Dade County, is Hispanic according to a list published by the Dade County League of Cities. It did not inquire whether the invalidated legislative plan served other important governmental interests, including facilitating other groups to exercise effective political power.

These omissions are not mere oversights. Consideration of these factors would have led the court to consider factors beyond the raw number of majority Hispanic districts. Instead, the District Court would have been forced to look to all the political realities of Dade County, and to have given consideration to other, competing, legitimate political interests.

B. The *Thornburgh* v. *Gingles* Plurality Opinion Is Not Faithful To The Legislative Purpose

The District Court is not entirely to blame for regarding the three core factors as determinative. The plurality opinion of Justice Brennan in *Thornburgh* v. *Gingles*, could be read to support the trial court's holding because it holds, *inter alia*, that once the three factors are demonstrated to exist, the remaining factors are of, at best, secondary, or even tertiary, importance. "While many or all of the factors listed in the Senate Report may be relevant . . . unless there is a conjunction of the following circumstances . . . [a practice] will not impede the ability of minority voters to elect representatives of their choice." 478 U.S. at 48.

In fact, the Eleventh Circuit itself has repeatedly split over the question of

whether the three core factors are alone enough to state a § 2 claim or whether more must be shown. See generally, *Meek* v. *Metropolitan Dade County*, 1993 W.L. 55654 (11th Cir. 1993); *Solomon* v. *Liberty County*, 889 F.2d 1012 (11th Cir. 1990). Although the trial court purported not to resolve this issue, it is impossible to conclude that it did not, resolving it in favor of a mechanical reading of *Thornburgh* emphasizing the three *Gingles* factors to the exclusion of all else.

The *Thornburgh* plurality opinion barely takes note of the stricture against proportional representation. Other than a one sentence reference to the Senate Committee report, see 478 U.S. at 46 -- a paraphrase which uses the formulation that the House of Representatives initially adopted, but which was rejected by the Senate as an insufficiently forceful and

effective bar against proportional representation[20] -- the plurality makes no reference to the central question in the Congressional debate over § 2.

The plurality opinion further distorted the legislative history by citing only those parts of the legislative history critical of the decision in *City of Mobile* v. *Bolden*, but not those parts critical of the proposed shift to a pure results test. Since those objections were the fulcrum of the debate in the Senate, and represented the position taken by the Administration, whose support was needed to secure adoption of the bill, the

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20. Justice Brennan wrote "[t]he conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation." 478 U.S. at 46, citing p.16 of the Senate Report. The language used by the plurality, however, does not appear in the Senate Report. It is lifted almost verbatim from the rejected language of the House bill. As discussed in Points II(f) and II(g), *supra*, the Senate language which became law is far more restrictive.

selective use of legislative history in *Thornburgh* v. *Gingles* leads to a distorted result.

In the two Voting Rights Act cases decided this year *Voinovich* v. *Quilter*, *supra*, and *Growe* v. *Emison*, *supra*, the Court has treated the three core *Gingles* criteria as only necessary indicia of a § 2 claim, not as sufficient grounds for a § 2 claim. Thus, in *Voinovich* v. *Quilter*, *supra*, this Court referred to the core *Thornburgh* v. *Gingles* criteria as "threshold conditions." If these criteria are not satisfied, there is no need for a court to make the searching factual inquiry demanded by the language of the statute, the legislative history and cases like *White* v. *Register* and *Zimmer* v. *McKeithen* which served as the model for the revised § 2.

What the trial court below did is quite different: it found the three core factors sufficient, mandating an invalidation of a presumptively valid state redistricting plan. Whatever little it did beyond analyzing those factors does not withstand scrutiny and was surely not the searching inquiry of the plain text of § 2. Thus, the approach of *Voinovich* v. *Quilter* is far closer to the meaning of the statute than a simplistic reading of *Thornburgh* v. *Gingles* is.

Under the *Thornburgh* plurality rule, there is little incentive for minority candidates to assert positions which appeal to a broad cross section of the electorate and to engage in cross-racial coalition building, for doing so would undermine a claim for a far safer majority-minority district.

So construed, the VRA is itself a factor in encouraging the politics of race. This is surely a perversion of a law firmly rooted in the integrationist civil rights movement of the 1960's. Jettisoning a reading of *Thornburgh* v. *Gingles* which holds that the three core factors are by themselves a sufficient basis for proving a § 2 claim would go far to restoring the VRA to its roots as an anti-discrimination statute, not a law encouraging racial separation. But even more important, limiting *Thornburgh* helps avoid the need to pass on the constitutionality of § 2.

IV. THE VOTING RIGHTS ACT SHOULD BE CONSTRUED TO AVOID THE CONSTITUTIONAL DIFFICULTIES ATTENDANT ON A STANDARD MAXIMIZING MINORITY POLITICAL POWER

Almost thirty years ago, this Court held that a state may not constitutionally encourage racial voting. *Anderson* v.

Martin, 375 U.S. 399 (1964). The Voting Rights Act of 1965 was designed to make real the constitutional promises of the Fifteenth Amendment, *Anderson*, and its progeny. It sought to give effect to the long line of this Court's cases vindicating the rights of all Americans to participate in governing their country, on an equal, and race-free basis, and to eliminate racial and racist barriers to such participation. No party to this case challenges these bedrock propositions.

There are those who believe it desirable to re-order our political system to facilitate racial, ethnic and sexual politics. They argue that it is only realistic to insist that redistricting facilitate that variety of politics, for no one can deny that these factors already play a role in the way at least some

people vote. In their view redistricting should facilitate race based politics.

But there are other arguments on the other side, arguments that are for us more powerful and persuasive. Those arguments were well put by Justice Douglas in responding to a claim put forth by minority politicians in defense of a racial gerrymander designed to create a safe minority seat:[21]

> The principle of equality is at war with the notion that District A must be represented by a Negro, as it is within the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on.
>
> . . .
>
> When racial or religious lines are drawn by the State, the multiracial multireligious communities that our Constitution seeks to weld together as one becomes separatist; antagonisms that relate to race

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21. The majority rejected the challenge to the gerrymander for want of proof of racist animus.

> or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.

Wright v. *Rockefeller*, 376 U.S. 56, 66-67 (1964) (Douglas, J., dissenting).

Amici believe that any shift to government encouragement of racial and ethnic group politics would be a radical shift from the way in which we as a nation have conceived of politics, even if we have often fallen short of that ideal. As Justice Douglas' remarks indicate, and as reinforced by the various opinions in *UJO* and this Court's recent reservation of the constitutional issue in *Voinovich* v. *Quilter*, *supra*; *cf*. *Chisom* v. *Roemer*, 111 S.Ct. 2354, 2376 (1991) (Kennedy, J., concurring), there are serious issues of constitutionality inherent in such a

system, particularly as widespread *de jure* discrimination recedes into more distant history.

If Congress intended a radical reordering of the nation's political theory -- and the singling-out of one possible organizing principle as the most important one -- it should say so explicitly, clearly and directly. It did not. Indeed, as we have shown it intentionally rejected such a possibility.

Given the long-standing rule that statutes should be construed to avoid constitutional difficulties, *Rowland* v. *California Men's Colony*, 113 S.Ct. 716, 726 (1993); *Rust* v. *Sullivan*, 111 S.Ct. 1759, 1771 (1991); *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), the courts should not impose that re-ordering based on a doubtful interpretation of ambiguous statutory language.

Nor does some overriding public policy argument call for an exception to the rule calling for construing statutes to avoid constitutional difficulties. There is no self-evident "national interest in creating an incentive to define political groups by racial characteristics," *City of Mobile* v. *Bolden*, 446 U.S. at 89 (Stevens, J., concurring). *A fortiori* the courts should not impose a maximization requirement as the trial court did below in the face of a Congressional disclaimer of any intent to create any political quota system for minorities, a far less ambitious standard.

CONCLUSION

For the reasons stated, the judgment should be reversed.

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Nos. 92-519, 92-593, 92-767

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BOLLEY JOHNSON, *et al.*,
Appellants,
v.
MIGUEL DE GRANDY, *et al.*,
Appellees.

MIGUEL DE GRANDY, *et al.*,
Appellants,
v.
BOLLEY JOHNSON, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,
v.
STATE OF FLORIDA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

BRIEF AMICUS CURIAE OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether a State-enacted reapportionment plan violates Section 2 of the Voting Rights Act because it does not maximize the electoral opportunities of a minority class in a geographic area of the State, even if the plan provides the minority class with an equal opportunity to participate in the political process and to elect candidates of its choice?

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BRIEF AMICUS CURIAE OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICUS

This brief is submitted on behalf of the Anti-Defamation League of B'nai B'rith which is a national Jewish organization. The B'nai B'rith was founded in 1842 and estab-

lished its Anti-Defamation League as its educational arm in 1913.

The Anti-Defamation League was organized to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons, whether they are members of a minority or the majority, and in assuring that each individual receives equal treatment under the law regardless of his or her race, ethnicity, or religion. The Anti-Defamation League takes the position that each person has a constitutional right to be judged on his or her individual merits, rather than as a component part of a particular racial or ethnic group.

Among its many activities directed to these ends, the Anti-Defamation League has in the past filed *amicus* briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in cases such as *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *United States Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Boston Police Patrolmen's Assn'n, Inc. v. Castro*, 461 U.S. 477 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547 (1990). More specifically, in the area of voting rights the Anti-Defamation League has filed *amicus* briefs in *United Jewish Organizations v. Carey*, 430 U.S. 197 (1977); and *Cardona v. Power*, 384 U.S. 672 (1966).

This brief is submitted because of the belief that our system of constitutional liberties is impaired when the law sanctions the use of race or ethnicity in the decision-making processes of governmental activities, except in certain circumstances where it is necessary to correct purposeful discrimination. The Anti-Defamation League regards as unsound the emerging principle under the Voting Rights Act that courts must automatically strive to create the maximum number of racial and ethnic voting districts to the exclusion of any other considerations. If this principle becomes the polestar under the Voting Rights Act, sanction will be given to compulsory electoral success for racial and ethnic minority classes, racial and ethnic divisiveness will intensify, and the process of popular elections on which our government rests will be seriously impeded.

SUMMARY OF THE ARGUMENT

The legitimacy of the Voting Rights Act hinges on the Court's decisions in these consolidated reapportionment cases. In the October 1992 term, the Court embarked on its first excursions into the application of amended section 2 of the Voting Rights Act to the reapportionment of single-member State legislative districts. As challenges involving multi-member districts decline and States reapportion their legislatures following the 1990 census, this Court will increasingly face serious questions regarding how the Voting Rights Act, the Constitution, and the quest for equality among all racial and ethnic classes are to be reconciled in single-member districts. The Court's answers to these questions will necessarily send powerful messages to every member of society regarding the values of our democratic form of government. The enduring principles this Court proclaims matter more than the results it may reach.

In this regard, three important principles are at the forefront in these consolidated cases. First, the Voting Rights Act should not be interpreted to require "separate but equal" districts for minority voters where such districts provide no greater opportunity for effective political participation or political influence. The Voting Rights Act was not intended to relegate racial, ethnic and language minorities to permanent minority status, which is the inevitable result of a fixation on race-based numerical goals. Instead, the Voting Rights Act must be interpreted and applied with the primary goal of rectifying discriminatory voting practices without an obsessive preoccupation with disproportionately magnifying race, ethnicity and language differences over all other factors.

Second, consistent with this principle, a violation of section 2 of the Voting Rights Act is not conclusively demonstrated simply because the three threshold requirements set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986),[1] are met in the State reapportionment context. The *Gingles* threshold requirements, if established, merely demonstrate that one or more *additional* majority-minority districts are *possible* in a geographic area under consideration. This bare possibility, however, is merely one piece of evidence of an asserted section 2 violation and is a beginning—not an end—to the inquiry. The statutory language of the Voting Rights Act mandates that a violation be demonstrated based on the "totality of the circumstances" such that all relevant factors must be carefully considered and balanced before concluding that a State-enacted reapportionment plan violates section 2. The standard for determining that a violation exists is whether a reapportionment plan results in minorities not having an equal opportunity to participate in the political process and to elect candidates of their choice. The *Gingles* threshold requirements do not, by themselves, answer this question.

[1] The Court determined that in order for a minority class to even assert a section 2 claim in the multimember district context it must prove (1) "it is sufficiently large and geographically compact to constitute a majority in a single member district"; (2) "it is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed . . . , usually to defeat the minority's preferred candidate." *Id.* at 50-51 & nn.16-17. In other words, the selection of a multimember electoral system cannot form the basis for a section 2 vote dilution claim if the minority class cannot even form a geographically compact and politically cohesive majority in a single member district.

Finally, the Voting Rights Act should not be interpreted to mandate the imposition of majority-minority (or minority-influence) districts merely because such districts can be computer-generated based solely on racial and ethnic criteria to the exclusion of all other relevant factors. Simply because a majority-minority (or minority-influence) district can be drawn does not mean it must be imposed. As these consolidated cases demonstrate, it is mathematically and topologically possible for voting districts to be drawn such that a racial or ethnic minority can control a majority of districts in a geographic region. A myopic focus on maximizing the number of voting districts based on racial and ethnic criteria leads to this distorted result. No racial or ethnic class is entitled to the maximum possible representation and nothing in the Voting Rights Act remotely supports such a policy.

ARGUMENT

THE VOTING RIGHTS ACT SHOULD NOT BE INTERPRETED TO REQUIRE "SEPARATE BUT EQUAL" VOTING RIGHTS AND DISTRICTS, OR THE MAXIMIZATION OF THE NUMBER OF MAJORITY-MINORITY OR MINORITY-INFLUENCE DISTRICTS

> The Voting Rights Act, once instrumental in overthrowing political apartheid in the South, is becoming a tool in the racial balkanization of American politics.[2]

The Anti-Defamation League supports the laudable concern for protecting the voting rights of all racial, ethnic and language minorities.[3] It supports and encourages efforts to effectively maintain and expand the political influence and voting rights of minorities in the body politic as a whole. The Anti-Defamation League fully supports the integration of all persons of all racial and ethnic backgrounds into contemporary political life, in Florida and throughout the nation. It also supports the principle that no racial or ethnic class is guaranteed either representation proportionate to its makeup in the population or the maximum representation possible.

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[2] *Turner v. State of Ark.*, 784 F. Supp. 553, 561 (E.D. Ark. 1991) (quoting Charles Lane, *New York Newsday*, Sept. 10, 1991, p. 40), *aff'd*, —— U.S. ——, 112 S. Ct. 2296 (1992).

[3] The Anti-Defamation League has considerable disagreement with the practice of grouping racial and ethnic minorities under common labels such as "Hispanic" or "African-American." This racial and ethnic grouping unfairly equates the color of one's skin with a community of interest and creates unjustified stereotypes of culturally diverse minorities. While many racial and ethnic minorities shrare a common history and culture, the color of one's skin alone does not create the community of interest. Instead, a "community's views on crime, employment, education, police brutality, urban sprawl, and urban blight, may be just as indicative of a community of interest as whether the members of the community are predominantly black or white." *Burton v. Sheheen*, 793 F. Supp. 1329, 1357 (D.S.C. 1992).

But the Anti-Defamation League vigorously opposes an interpretation of the Voting Rights Act that results in "separate but equal" voting rights and districts for minorities.[4] The integration ideal can not be realized under a system where minorities achieve political power through political and geographic segregation. Political candidates must be evaluated on their merits—not their race—and it should be possible for minority voters not only to elect candidates of their choice but for minority candidates to be elected in numbers equal to or greater than their proportion in the population.[5] These ideals become unattainable if racial and ethnic minorities become automatically entitled to "separate but equal" districts under the calculus of the Voting Rights Act.[6]

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[4] " 'Separate but equal' and 'separate but better off' have no more place in voting districts than they have in schools, parks, railroad terminals, or any other facility serving the public." *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting).

[5] For this reason, the Anti-Defamation League views with disfavor the concept that "representatives of choice" or "minority-preferred candidates" must necessarily be of the same racial or ethnic background as the minority class at issue.

[6] The conventional litigation strategy under the Voting Rights Act focuses on the election of minority representatives who will thereby represent minority interests and be spokespersons for political equality. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1078 (1991). This preoccupation with electoral success "stifles rather than empowers" minority political participation. *Id.* at 1079. It may result in the election of more minority officials, but it ignores "broadening the base of participation and fundamentally reforming the substance of political decisions." *Id.* at 1080. It also "assumes that majority winners rule legitimately, even where such rule leads to permanent minority losers." *Id.* For example:

> [B]lack electoral success theory simply reconfigures winner-take-all electoral opportunities into geographically based, majority-black, single-member districts. Representing a geographically and socially isolated constituency in a racially

Race and ethnicity necessarily play a role in both the liability and remedy stages of a Voting Rights Act claim.[7] A concern for minority voting rights, however, should not automatically result in the imposition of ill-conceived and bizarre-shaped voting districts into which racial, ethnic and language minorities are herded to meet some artificially-imposed numerical goals. Such a reflexive response ignores any consideration of whether existing communities of minority voters, who are currently able to exercise effective political influence, would be disenfranchised by creation of a majority-minority (or minority-influence) district. This type of "remedy" also violates the mandate of the Voting Rights Act that racial and ethnic minorities need not be elected in numbers equal to their proportion in the population.[8] Further, the mechanical imposition of majority-minority (or minority-influence) districts can pervert the Voting Rights Act by allowing minority classes to achieve disproportionately *greater* political strength than is otherwise justified based on the totality of all relevant circumstances.

The Voting Rights Act is a conflict of visions and reflects an untenable compromise between opposing policy

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polarized environment, blacks elected from single-member districts have little control over policy choices made by their white counterparts. Thus, although it ensures more representatives, district-based black electoral success may not necessarily result in more responsive government.

Id. Finally, minority electoral success "romanticizes" minority elected officials as "empowerment role models" and thereby ignores problems of "tokenism" and a false sense of "equality of opportunity." *Id.* at 1079-80.

[7] *See, e.g., United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (no *per se* rule against using racial factors in districting and apportionment under Fourteenth and Fifteenth Amendments) (White, J., joined by Stevens, J., Brennan, J., and Blackmun, J., with Stewart, J., and Powell, J., concurring in the judgment).

[8] The Voting Rights Act does not establish "a right to have members of the protected class elected in numbers equal to their proportion in the population." 42 U.S.C.A. § 1973(b) (Supp. 1992).

perspectives. For this reason, its interpretation is "not an easy task." *Thornburg v. Gingles*, 478 U.S. 30, 84 (1986), (O'Connor, concurring). Congress enacted section 2 of the Voting Rights Act to help achieve the Fifteenth Amendment's guarantee that no citizen's right to vote is "denied or abridged . . . on account of race, color, or previous condition of servitude." *NAACP v. New York*, 413 U.S. 345, 350 (1973). Much has been written about the history leading to the Act's adoption in 1965 and its amendment in 1982 to implement a "results" rather than "intent" test (including the legislative intent of the 1982 amendments).[9]

Despite the body of scholarship on the Act and its purpose, no consensus has formed on a single standard for determining liability under section 2. Instead, reasonable minds disagree. The Anti-Defamation League believes, however, that the right question to ask is whether " 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.' " *Gingles*, 478 at 44 (quoting from U.S. Code Cong. & Admin. News 1982, p. 206). The right question in these consolidated cases, therefore, is whether the State of Florida's reapportionment plans for its Senate and House, Senate Joint Resolution 2-G, result in the defined minority classes having less than an equal opportunity to participate in the political process or elect candidates they support.

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[9] U.S. Code Cong. & Admin. News 1982, pp. 192-221 (legislative history of amendment to section 2); *see generally* BERNARD GROFMAN, LISA HANDLEY, & RICHARD G. NIEMI, MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 38-42 (1992) (review of 1982 amendments and legislative history) (hereafter QUEST FOR VOTING EQUALITY); Jack Quinn, Jonathan B. Sallet, and Donald J. Simon, *Congressional Redistricting in the 1990s: The Impact of the 1982 Amendments to the Voting Rights Act*, 1 GEO. MASON CIV. RIGHTS L.J. 207 (1990) (discussion of case law and issues arising since the 1982 amendments).

This ultimate question raises a host of intermediate questions. The first is whether proof of the *Gingles* threshold requirements conclusively establishes liability under section 2 in the State reapportionment context. A related question is what standard or measure of minority voting strength is relevant in determining whether a challenged reapportionment plan denies a minority class equal opportunities to participate in the political process and elect candidates of its choice. Another is whether the maximum number of majority-minority (or minority-influence) district must automatically be imposed as a remedy for a section 2 violation.

The answers to these methodological questions are complex but certain principles are discernable. First, in determining whether a section 2 violation has occurred *all* relevant factors must be assessed—not just the three *Gingles* threshold factors. Second, the standard by which to gauge a State's reapportionment plan is not a hypothetical plan that maximizes the number of majority-minority (or minority influence) districts or a plan that provides proportional representation. Instead, the standard is set forth in the Voting Rights Act and *Gingles*: whether based on the totality of the circumstances the State's plan would cause a minority class to have less than an equal opportunity to participate in the political process or elect candidates they support. Finally, the Voting Rights Act does not sanction the maximization of the number of majority-minority (or minority-influence) districts. Federal courts should be extremely hesitant to impose additional majority-minority (or minority-influence) districts where a minority class already has a meaningful opportunity to participate in the political process and elect representatives sensitive to its concerns.

A. Proof Of The *Gingles* Threshold Requirements Does Not Conclusively Establish A Section 2 Violation

A fundamental question is whether a violation of section 2 of the Voting Rights Act is conclusively demonstrated simply because the three threshold requirements of *Thornburg v. Gingles* are met in the reapportionment context.[10] The Anti-Defamation League respectfully suggests that it is not.

First, and most importantly, the statutory language of section 2 requires that a "totality of the circumstances" test be used to determine whether a violation has occurred.

> A violation . . . is established if, *based on the totality of the circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C.A. § 1973 (Supp. 1992) (emphasis added). It cannot be seriously argued that the three-part *Gingles* test encompasses the entire range of factors that Congress intended under a "totality of the circumstances" approach. For this reason alone, the *Gingles* prerequisites are insufficient to establish a violation.[11]

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[10] The Eleventh Circuit's equally divided opinion in *Solomon v. Liberty County, Fla.*, 899 F.2d 1012 (11th Cir. 1990) (en banc), demonstrates the polar positions on this issue. The court split on whether the *Gingles* threshold criteria, if proven, conclusively demonstrate a violation. Five judges supported the position that satisfying the three *Gingles* criteria under the circumstances presented was sufficient to establish a section 2 violation. *Id.* at 1021 (plaintiffs "met all three *Gingles* requirement. This is all the Supreme Court requires, and I may require no more."). Five other judges rejected a "mechanical interpretation" of section 2 and contended that proof of the *Gingles* requirements does not invariably establish a violation. *Id.* at 1035.

[11] *See Gingles*, 478 U.S. at 46 ("Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process."); *Voinovich v. Quilter*, —— U.S

Second, the *Gingles* threshold criteria are a methodology for analyzing whether a plaintiff minority class has a viable—not necessarily a successful—section 2 claim. The *Gingles* test is an initial hurdle or precondition, not a finding of ultimate liability. The question in *Gingles* was whether the minority plaintiffs' "ability *to elect* the representatives of their choice was impaired by the selection of a multimember electoral structure." 478 U.S. at 46 n.12 (emphasis in original). Unless minority voters possess the potential to elect representatives in the absence of the challenged multi-member structure, they can not claim to have been injured by the State's use of multi-member districts. *Id.* at 50 n.17.

The argument is similar in the reapportionment context. A minority class cannot claim that a reapportionment plan violates section 2 unless, as a precondition, the minority class can demonstrate that the plan has the *potential* to be discriminatory because it submerges or fragments a geographically compact and politically cohesive minority class that could otherwise form a majority in a single member district.[12] Proof of the three thresh-

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——, 113 S. Ct. 1149, 1157 (1993) ("plaintiffs can prevail on a dilution claim only if they show that, under the totality of the circumstances, the State's apportionment scheme has the effect of diminishing or abridging the voting strength of the protected class.").

[12] The three *Gingles* prerequisites are relevant threshold requirements in establishing a vote-fragmentation claim with respect to single member districts. *Growe v. Emison*, —— U.S. ——, 113 S. Ct. 1075 (1993).

> The "geographically compact majority" and "minority political cohesion" showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district[.] And the "minority political cohesion" and "majority bloc voting" showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population[.] Unless these points are established, there neither has been a wrong nor can be a remedy.

113 S. Ct. at 1084 (citations and footnote omitted).

old requirements merely demonstrates that a State could have drawn one or more additional majority-minority districts in a particular geographic region. This inquiry merely answers the question whether a State's plan *could* be violative of section 2. The *Gingles* threshold factors, if proven, begin consideration of the "totality of the circumstances"—they do not end the inquiry. For this reason, a plaintiff's burden is not met by using the *Gingles* threshold requirements as an evidentiary shortcut to ultimate liability.[13]

Finally, the *Gingles* preconditions, by themselves, create perverse incentives that detract from the integration ideal. The requirement of a "sufficiently large and geographically compact" minority makes racial segregation a prerequisite for a voting rights violation.[14] The requirement of racially polarized voting lessens the prospects of long term cross-racial political unity. The concept of a "minority-preferred candidate" adds legitimacy to the stereotype that only a minority can represent minority interests and that minorities are preoccupied with race and ethnicity and have little concern for other pressing social, economic and political issues.[15] Simply stated, the *Gingles* test institutionalizes an entitlement to distinct racial and

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[13] The burden of proving a violation of section 2 is "squarely on the plaintiff's shoulders." *Voinovich v. Quilter*, —— U.S. ——, 113 S. Ct. 1149, 1156 (1993).

[14] *See* Dona R. Carstarphen, *The Single Transferable Vote: Achieving the Goals of Section 2 Without Sacrificing the Integration Ideal*, 9 YALE L. & POL'Y REV. 405, 407 (1991).

[15] The concept has resulted in considerable disagreement regarding whether the race of a "minority-preferred" candidate is a proper consideration under section 2 analysis. *See* Sushma Soni, *Defining the Minority-Preferred Candidate Under Section 2*, 99 YALE L.J. 1651 (1990) (analyzing various approaches and suggesting that the race of minority-preferred candidates is properly considered as a factor in determining a section 2 violation).

ethnic districts and perpetuates the notion that minorities have "separate but equal" voting rights.[16]

In summary, determining whether a State's reapportionment plan violates section 2 of the Voting Rights Act necessitates a probing and thoughtful consideration of numerous historical, social, economic, legal and political factors. The Voting Rights Act recognizes the complexity of this inquiry and requires that an asserted violation be based on the "totality of the circumstances." The three *Gingles* threshold requirements, however, do not encompass the "totality of circumstances" and thereby cannot conclusively establish liability. Instead, they merely demonstrate that plaintiffs present a *viable* section 2 claim.

B. The Proper Standard For A Violation Of Section 2 Is Whether A Challenged Reapportionment Plan Denies A Minority Class Equal Opportunities To Participate In The Political Process And Elect Candidates Of Its Choice

The next step in determining whether a State's reapportionment plan violates section 2 requires a comparison of the State's plan against some standard of "undiluted" or "unfragmented" minority voting strength. Various standards of minority voting strength exist such as hypothetical plans that provide either proportionate representation or maximum feasible voting strength.[17]

[16] In addition, litigation since *Gingles* has unnecessarily focused on minority electoral success as the singular measure of minority political achievement. The "opportunity to elect candidates, while important, is not the sole or even the most crucial element of political efficacy. Important political goals such as expression of preferences and alteration of substantive policies are accomplished not simply by pulling a lever, but by engaging in activities such as discussion, lobbying, and coalition-building with others." Kathryn Abrams, *"Raising Politics Up": Political Participation and Section 2 of the Voting Rights Act.* 63 N.Y.U. LAW REV. 449, 452 (1988).

[17] *See Gingles*, 478 U.S. at 88-99 (discussion of various measures of "undiluted" voting strength including "maximum feasible voting strength" stnadard) (O'Connor, J., concurring in judgment); *see also*, QUEST FOR VOTING EQUALITY, *supra* note 9, at 124-28 (discussion of standards other than single member districts such as single-nontransferable voting systems, semiproportional systems, power sharing devices, etc.).

The choice of standards is important because, to a great extent, the standard for determining liability becomes the standard for relief. For instance, if a State's plan is compared with, and falls short of, a standard that provides for maximum possible minority voting strength, a district court may become more inclined to find a section 2 violation and impose the standard used as the appropriate remedy.

The problem is that once the *Gingles* criteria are met, it becomes tempting for district courts to place inordinate or conclusive weight on them in determining section 2 liability. This approach unjustifiably reduces a probing inquiry into all relevant factors into an examination of whether another majority-minority district could be drawn. This seriously misinterprets *Gingles* and the Voting Rights Act. A methodology that fixates on providing maximum possible minority representation or mathematically equivalent representation is flawed because the Voting Rights Act does not guarantee any racial or ethnic class either maximum feasible voting strength or proportionate representation.

Instead, the appropriate standard is whether a State's challenged reapportionment plan provides an equal opportunity to all racial and ethnic classes to participate in the political process and elect candidates of their choice.[18] In applying this standard, it may be permissible for litigants to compare a State's plan with hypothetical plans that provide for proportionate or maximum feasible voting strength. States should be permitted to defend their plans against such standards. But the legal standard must ultimately be whether based on the totality of the cir-

[18] 42 U.S.C.A. § 1978 (Supp. 1992); *Gingles*, 478 U.S. at 44.

cumstances a State's plan provides racial and ethnic minority classes with equal opportunities to participate in the political process and elect candidates of their choice. A State's plan may provide these opportunities even if the *Gingles* threshold criteria are established and additional majority-minority (or minority-influence) districts are possible.

C. The Voting Rights Act Does Not Mandate the Creation Of The Maximum Number Of Majority-Minority Or Minority-Influence Districts

Undue reliance on the *Gingles* threshold criteria can result in a misguided liability and remedial standard: the maximization of the number of minority-controlled districts. The Voting Rights Act, however, does not mandate the imposition of majority-minority (or minority-influence) districts merely because such districts can be computer-generated based solely on racial and ethnic criteria without due consideration of other relevant factors. The fact an additional majority-minority (or minority-influence) district can be drawn does not mean it should be imposed, particularly where a minority class has meaningful representation in its geographic area. The holding in *Gingles* should not result "in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts." *Gingles*, 478 U.S. at 85 (O'Connor, J., concurring).

Similarly, there is no right to the maximum feasible representation in favor of racial and ethnic minority classes. It is mathematically and topologically possible for voting districts to be drawn, as these consolidated cases demonstrate, such that a racial or ethnic minority can have effective control of more than a majority of districts. A myopic focus on maximizing the number of voting districts of geographically and politically cohesive

racial and ethnic minorities leads to this distorted result. Nothing in the Voting Rights Act remotely supports such a policy.

A simple mathematical example demonstrates how the maximization principle leads to unwarranted results.[19] Suppose state X has a population of 100,000 and 10 Senate districts (10,000 persons per district). State X's population includes 40,000 persons comprising a single "politically cohesive" minority class. State X enacts a Senate plan providing for ten districts, four of which are geographically compact "safe" minority districts as set forth in Table 1.[20]

TABLE 1

STATE X'S SENATE PLAN #1

District	Non-Minority	Minority
1	3,500	6,500*
2	3,500	6,500*
3	3,500	6,500*
4	3,500	6,500*
5	7,500*	2,500
6	7,500*	2,500
7	7,500*	2,500
8	7,500*	2,500
9	7,500*	2,500
10	8,500*	1,500
TOTAL	60,000	40,000

[19] The examples presented are structured around a fictitious State X, but could just as easily represent a limited geographic region within State X. The principles the examples illustrate, therefore, can be applied to portions of a reapportionment plan limited to a particular geographic area or region of a State.

[20] For purposes of this example, a "safe" minority district requires that 65% of its voting age population be from the minority class. *E.g.*, Districts 1-4 in Table 4. For an overview of the 65 percent rule, *see*, QUEST FOR VOTING EQUALITY, *supra* note 9, at 120-121.

State X's Senate plan provides a meaningful opportunity for the minority class to elect candidates of its choice in four districts, and does not disenfranchise the minority class in the remaining six districts. Instead, the minority class has some degree of influence in the remaining districts, such that candidates cannot entirely ignore the minority class' interests.

An alternative plan that maximizes the number of "safe" majority-minority districts is set forth in Table 2.

TABLE 2

SENATE PLAN #2

District	Non-Minority	Minority
1	3,333	6,667*
2	3,333	6,667*
3	3,333	6,667*
4	3,333	6,667*
5	3,333	6,667*
6	3,335	6,665*
7	10,000*	0
8	10,000*	0
9	10,000*	0
10	10,000*	0
TOTAL	60,000	40,000

This alternative plan provides the minority class with the opportunity of electing candidates of its choice in six districts, thereby having a super-majority of representatives in State X's Senate despite constituting a minority of the population. This plan diminishes the Non-Minority class' voting rights and entirely disenfranchises minority influence in four districts. Needless to say, such a plan would more likely paralyze rather than promote the progress of racial or ethnic harmony in State X.

The type of plan depicted in Table 2, however, results from the unidimensional focus on maximizing the number of racial or ethnic majority-minority districts. The geographically compact requirement of *Gingles*, of course, may somewhat reduce the number of possible majority-minority districts in State X.[21] Nonetheless, the point remains that the maximaztion principle can, and will in many instances, result in disproportionately greater representation than is otherwise justified.

This maximization principle has an unspoken corollary: the minimization of the majority class' voting opportunities. The goal of maximizing the number of majority-minority districts reflects a willingness to minimize the number of majority-majority districts. In Florida, reapportionment is a zero sum game. The number of districts is constitutionally capped at the current numbers of 40 and 120 for Senate and House districts, respectively. Art. III, § 16(a), FLA. CONST. Each additional district crafted for a minority class is one less district for another minority class or the non-minority class. An increase in the number of majority-minority districts, of course, is justified if necessary to rectify a State's failure to provide the minority class with equal opportunities to participate in the political process and elect candidates of its choice. But no sound interpretation of the Voting Rights Act supports the automatic maximization or minimization of any race or ethnic class' voting opportunities.

Maximization neglects other important values. Districts that attempt to whittle out majority-minority and minority-influence districts often merely "bleach" minority voters from surrounding districts in which they have exercised some influence and compartmentalize them into a "separate but equal" district. Maximization can lead to the creation of bizarre-shaped districts linking enclaves of mi-

[21] The compactness requirement, however, has become of relatively inconsequential importance in drawing minority-controlled districts. *See* QUEST FOR VOTING EQUALITY, *supra* note 9, at 64-65 (noting "the extraordinary ingenuity of mapmakers, aided by computers and geographically-based census files, has already produced new districts for the 1990s that surpass almost any earlier district in degree of contortion.").

nority voters from distant communities that are so geographically spread out that there is no sense of community or commonality.[22] These districts may be unmanageable from the standpoint of constituent services.[23] Such districts can become so convoluted that members and representatives can scarcely tell who actually lives in their respective districts.[24]

Maximization also leads to the gerrymandering of diverse geographic and political interests into districts without a commonality of interest. Maximization may merely move minority voters to districts where they can be packed together to increase their numbers, and presumably their influence, while reducing their overall influence. Simply because a majority-minority or minority-influence district can be theoretically drawn, often it will not satisfy the requirement that the district be geographically compact.[25] For this reason, minority populations should not be haphazardly joined together as the automatic, reflexive, or even preferred response to achieving the desirable mandate of the Voting Rights Act.

Further, as the racial and ethnic composition of a State becomes larger and more diverse the maximization principle crumbles under its own weight.[26] Suppose that State

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[22] *See Burton v. Sheheen*, 793 F. Supp. 1329, 1356 (D.S.C. 1992).

[23] *Id.*

[24] *Id.* As District Judge Roger Vinson stated regarding Florida's Congressional reapportionment plan, "[p]erhaps most importantly, I do not believe that these districts will make sense among the public. They appear to be something created by Governor Elbridge Gerry." *De Grandy v. Wetherell*, 794 F. Supp. 1076, 1092 (N.D. Fla. 1992) (Vinson, J., concurring).

[25] "Without some objective geographical compactness standard to evaluate districts, the potential for future abuse in crafting district boundaries is virtually unlimited." *Id.* (Vinson, J., concurring).

[26] Other significant issues also arise as a population becomes more racially and ethnically diverse. *See* Rick G. Strange, *Application of the Voting Act to Communities Containing Two or More Minority Groups—When Is the Whole Greater Than the Sum of the Parts?*, 20 TEX. TECH L. REV. 95 (1989) (discussion of various issues such as whether distinct racial and ethnic minority groups can be aggregated for purposes of *Gingles* threshold requirements).

X's population is comprised of *two* politically cohesive minority classes of 40,000 (Minority 1) and 20,000 (Minority 2), respectively. Also, State X's population is dispersed such that no members of Minorities 1 and 2 are located in a region of the State that has a Non-Minority population of 20,000 thereby requiring the establishment of two Non-Minority districts. Two alternative and mutually exclusive plans that maximize the number of "safe" majority-minority districts for Minorities 1 and 2 are set forth in Table 3.[27]

TABLE 3

ALTERNATIVE SENATE PLANS #3/#4

District	Non-Minority Plan #3/#4	Minority 1 Plan #3/#4	Minority 2 Plan #3/#4
1	2,000 / 3,333	8,000*/ 6,667*	0/0
2	2,000 / 3,333	8,000*/ 6,667*	0/0
3	2,000 / 3,333	8,000*/ 6,667*	0/0
4	2,000 / 3,333	8,000*/ 6,667*	0/0
5	2,000 / 3,333	8,000*/ 6,667*	0/0
6	3,334 / 3,335	0 / 6,665*	6,666*/0
7	3,333 / 0	0 /0	6,667*/10,000*
8	3,333 / 0	0 /0	6,667*/10,000*
9	10,000*/10,000*	0 /0	0 /0
10	10,000*/10,000*	0 /0	0 /0
TOTAL	40,000 /40,000	40,000 /40,000	20,000 /20,000
# of Safe Districts	2/2	5/6*	3*/2

Under these circumstances, a complex and irreconcilable situation results if Minority 1 claims entitlement to six "safe" seats (under Plan 4) and Minority 2 claims entitlement to three "safe" seats (under Plan 3). The total of

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[27] For purposes of this example, a "safe" district for Minority 1 or Minority 2 requires that 65% of its voting age population be from the particular minority class.

nine seats claimed exceeds the eight available.[28] The maximization principle loses its virtue at this point because no principled basis can explain why Minority 1 or Minority 2 should be entitled to the additional district to add to their already supra-proportional representation in State X.[29] The legitimacy of the maximization principle quickly deteriorates as the number of racial and ethnic classes increases, each demanding their own districts from the limited number available.

Finally, an important question is whether racial and ethnic proportionality on a statewide or regional basis are proper considerations in determining a violation of, or remedy under, section 2. For example, suppose a minority class constitutes 10% of a State's voting age population, half of which is dispersed throughout the State such that the *Gingles* threshold criteria cannot be met in those areas. The other half is concentrated primarily in a densely populated urban area of the State where it constitutes 50% of the voting age population and can form a geographically compact and politically cohesive majority in more than 50% of the area's legislative districts.

Under these circumstances, must the State attempt to provide the minority class with control of 10% of legislative districts on a statewide basis, despite the minority's inability to meet the *Gingles* threshold requirements

[28] This is the type of conflict of minority interests that the District Court confronted in reviewing the Senate and House Plans in the Dade County area.

[29] Complicating matters further, Minority 1 could be deemed the "majority" class in the remainder of State X because it has 40,000 of the 80,000 population to be apportioned among the eight districts. The "Non-Minority" class could be deemed a minority class, along with Minority 2, because each have only 20,000 of the 80,000 population to be apportioned and each could claim entitlement to three "safe" seats. The maximization principle, therefore, muddles rather than enlightens the determination of which of the racial classes are entitled to the eight seats.

throughout most of the State? Does a State plan that provides for proportional representation in the urban area, but not statewide, violate section 2? Does the minority class have a claim to additional, super-majority districts in the urban area in order to achieve statewide proportionality? The answers to these questions are self-evident.

It is axiomatic that there is no right to racially or ethnically proportional representation on either a statewide or regional basis. The text of the Voting Rights Act clearly provides there is no "right to have members of the protected class elected in numbers equal to their proportion in the population." 42 U.S.C.A. § 1973(b) (Supp. 1992). It will invariably be the case that racial and ethnic minorities cannot establish the *Gingles* threshold criteria throughout many parts of a State because they are not sufficiently numerous to constitute a majority in a geographically compact district. This fact does not grant to members of the minority class in another part of the State, where the *Gingles* threshold criteria can be met, a claim to disproportionately greater representation to achieve statewide racial balance.

CONCLUSION

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.[30]

The Anti-Defamation League recognizes the need to remedy purposeful discrimination, and supports the principles that motivated the initial enactment of the

[30] *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting).

Voting Rights Act. The Anti-Defamation League, however, strongly opposes the notion that each racial and ethnic group in America has a right to electoral success in a prescribed number of seats in government. Such a result is contrary to the fundamental democratic principles upon which our Constitution and the Voting Rights Act are founded. Guaranteeing proportional or maximum minority electoral success is misguided, and is a certain step down the path to racial and ethnic political separatism. Discrimination and deliberate denial of voting opportunity are evils that justify a remedy. But political segregation for racial and ethnic minorities cannot conquer these evils in the long term. True racial equality cannot be realized in "separate but equal" representative systems. The Anti-Defamation League therefore respectfully asks that this Court interpret the Voting Rights Act in these consolidated cases in accordance with the principle and purpose for which it was enacted; equality of political opportunity.

Respectfully submitted.

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No. 92-519

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October Term, 1992

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BRIEF OF AMICI CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF APPELLEES

INTEREST OF AMICI CURIAE[1]

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a non-profit national civil rights organization headquartered in Los Angeles. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. Because of the importance of the fundamental right to vote, MALDEF has represented Latino voters in numerous voting rights cases, has frequently appeared before this Court in such cases, *see, e.g., City of Lockhart v. United States*, 460 U.S. 125 (1983), has challenged the redistricting of the most populous local jurisdiction in the country, *see Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal.), *aff'd*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. ___, 111 S.Ct. 681, 112 L.Ed.2d 673 (1991), and has been intensely involved in redistricting advocacy following the 1990 census, *see, e.g., Hastert v. State Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991) (three-judge court); *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992).

The Puerto Rican Legal Defense and Education Fund, Inc. ("PRLDEF") is a national civil rights organization founded in 1972 to protect the civil rights of Puerto Ricans and other Latinos, and to ensure their equal protection under the law. Since its inception, PRLDEF has worked to politically empower the Puerto Rican and Latino communities. Barriers to Latino political participation have been lifted, and voting rights violations have been successfully challenged by PRLDEF in the courts and

[1] Letters consenting to the filing of this brief have been filed with the clerk of the court.

before the United States Department of Justice. PRLDEF is currently working to ensure equal opportunity for Puerto Ricans and other Latinos in the redistricting process which is, and has been, occurring throughout the country as a consequence of the decennial census. PRLDEF currently is, and has been, engaged in litigation surrounding this latest round of redistricting, *see e.g., PRLDEF, et al., v. City of New York*, 769 F. Supp. 74 (E.D.N.Y. 1991) (City Council redistricting); *PRLDEF, et al., v. Gantt*, 796 F. Supp. 681 (E.D.N.Y. 1992) (three-judge court) (Congressional redistricting).

SUMMARY OF ARGUMENT

State appellants ask this Court to reject the district court's findings of fact that the Latino community is sufficiently large to form a majority in eleven seats in the Florida House of Representatives. They seek to have this Court create a new rule only for the Latino population that would require assessment of the Latino population's right to representation under the Voting Rights Act in a manner different from all other populations in the state. This new criteria would require only Latino communities to demonstrate the effectiveness of a district by showing a clear citizenship voting age population (hereinafter, CVAP) majority before liability can be established.

State appellants effectively ask this Court to reject the district court's findings of fact based on a race-based presumption that the Latino community is disproportionately composed of non-citizens. Trial testimony established that the eleven Florida State House districts

proposed by appellees (each with a Latino voting age population (hereinafter, VAP) of 59% or greater) would result in an electable Latino district. Yet, State appellants argue that, based on their measure of citizen voting age population alone, the Court was precluded from even a liability finding in this action. Their argument is wholly without merit.

First, such race-based presumptions have consistently been rejected as impermissible State behavior. *Cf., eg. Palmore v. Sidoti*, 466 U.S. 429 (1984). Nowhere in the record have State appellants challenged the right of any other population to equitable levels of representation or the effectiveness of districts created based on an assessment of the number of citizens believed present in the population, despite the very large non-Latino immigrant populations present in the state. The assumption, therefore, is that the State appellants would have this Court establish an unprecedented race-based presumption in voting rights cases for Latino populations throughout this country that will not be applied to any other populations, and will ultimately act as a bar to equal representation for Latinos.

State appellants urge that such a rule be established despite the fact that when redistricting takes place, citizenship population data is not available from the Census and total population data is used to construct districts for one-person, one-vote purposes.[2]

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[2] Typically, redistricting of election districts occurs during the period following release of the decennial census data by the Bureau of the Census to the states in the early part of the first year after the enumeration and before election processes begin

Second, appellants seek to elevate one factor in cases concerning Latino voting rights – the percentage of citizenship voting age population – to a brightline bar to liability under Section 2 of the Voting Rights Act. Section 2, however, does not impose a brightline test for liability for any population group. The test is one of the "totality of the circumstances," based on an intensive local and practical appraisal.

Third, even assuming arguendo that citizenship population is relevant in demonstrating the first prong of the test set forth in *Thornburg v. Gingles*, 478 U.S. 301, 50 (1986), i.e., that the minority population is "sufficiently large and geographically compact to constitute a majority in a single-member district," the district court found appellees' evidence concerning the viability of Latino districts credible. The district court rejected appellants' evidence on the Latino citizenship voting age population. Those findings of fact are not clearly erroneous and must be upheld.

Furthermore, contrary to appellants' arguments, the district court entered appropriate remedial relief, and the

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for the subsequent year. At that time only two sets of demographic data are available – total population data and voting age population data. Census information on responses to survey questions, like citizenship status, is not compiled or released by the Bureau until about a year later, well after the redistricting processes in most jurisdictions have been completed, and election processes begun or finalized. Thus, citizenship data per se has never been considered in either apportionment or redistricting exercises by states.

United States was not precluded from bringing this action by a decision of the Florida Supreme Court.

ARGUMENT

I

THE DISTRICT COURT'S DETERMINATION THAT THE LATINO COMMUNITY WAS SUFFICIENTLY LARGE TO BE A MAJORITY IN ELEVEN STATE HOUSE SEATS IS NOT CLEARLY ERRONEOUS.

A. Section 2 Liability is Established Under A Totality of Circumstances Test

State appellants argue that plaintiffs below have not established liability because certain proposed Latino supermajority districts allegedly do not have Latino citizenship voting age majorities. No where in the statute or the legislative history of the Voting Rights Act does Congress erect such a barrier to the protection of minority voting rights. 42 U.S.C. § 1973.

The statute and legislative history of the Act make clear that courts are not to measure the viability of a claim by one isolated factor. Rather, Congress intended that courts assess the totality of the circumstances in determining whether a challenged election system or practice results in discrimination. "Plaintiffs must either prove . . . intent, or alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process." S. Rep. No. 97-417, 97th Cong. 2d Sess. 27, *reprinted*

in 1982 U.S. Code Cong. & Admin News 177, 205 (hereinafter "S.Rep."). To establish a claim, the Senate Report listed a number of typical factors which could be shown and which would be indicative of discrimination in voting. S.Rep. at 28-29.

While Congress enumerated these factors, it made clear "that there [was] no requirement that any particular number of factors be prove[n], or that a majority of them point one way or the other." *Id.* at 29. Congress also made clear that these factors were not to be used as a "mechanical 'point counting' device," and that "[t]he failure of [a] plaintiff to establish any factor is not rebuttal evidence of non-dilution." *Id.* at 29 n.118. "Rather, the provision requires the Court's overall judgment, based on the totality of circumstances, and guided by *those relevant factors in the particular case*, of whether the voting strength of voters is . . . 'minimized or canceled out.' " *Id.* (emphasis added).

Thus, Congress intended courts to make determinations based on the totality of factors relevant to the specific cases before them and not to eliminate claims based on a certain checklist or threshold of factors. The question of whether the political process is " 'equally open' depends upon a searching practical evaluation of the 'past and present reality.' " *Id.* at p. 30, *quoting White v. Register* 412 U.S. 755, 769-770 (1973). The "ultimate test" is "whether, in the particular situation, the practice operated to deny the plaintiff an equal opportunity to participate and to elect candidates of their choice." S. Rep. at 30. It is contrary to the clear intent of Congress to elevate any one factor – here, citizenship voting age population – to bar

liability under the Act. State appellants' arguments to the contrary are without merit.

B. Under the Totality of the Circumstances The District Court Did Not Err In Finding That The Florida State Plan Denied Latinos An Equal Opportunity to Elect Representatives of Their Choice.

To determine whether a minority community has been denied equal electoral opportunity, courts have traditionally used as the measure of equal opportunity the potential of a protected class to elect representatives in single member districts. As this Court stated in pertinent part in *Gingles*:

> The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected.

[478 U.S. at 50 n. 17 (emphasis in original)].

Thus, the gravamen of section 2 liability is whether the electoral structure adopted denies the *potential* of a particular group to elect representatives.

No brightline test exists for establishing that a protected class is sufficiently large to have been denied equal electoral opportunity through vote dilution. Rather, a district by district analysis is required to assess the percentage of a protected class necessary to create a minority district. *Cf. Gingles*, 478 U.S. at 55-56 ("the degree of bloc voting which constitutes the threshold will vary from district to district.").

The judgment of the lower courts is crucial in weighing the factors based on the local context. This Court has recognized the importance of "an intensely local appraisal" in vote dilution cases. *Gingles*, 478 U.S. at 79 (quoting *Rogers v. Lodge*, 458 U.S. 613, 622 (1982)). This Court has also noted the particular expertise of district court judges, who are familiar with local conditions and history, in making these appraisals.

Thus, courts in various localities have arrived at different conclusions based on their local appraisals of the totality of the circumstances. *Compare Ketchum v. Byrne*, 740 F.2d 1398, 1413-1416 (7th Cir. 1984) *with Nash v. Blunt*, 797 F. Supp. 1488, 1500 (W.D. Mo. 1992) (three-judge court), *aff'd sub nom., African-American Voting Rights Legal Defense Fund v. Blunt*, 113 S. Ct. 1809 (1993) (holding a district with 51.2% black VAP has an effective black majority when black incumbency and party affiliation were considered.)

Here, the district court assessed the electoral history of each of eleven supermajority Latino districts proposed by plaintiffs to determine liability.

State appellants argued that appellees failed to establish liability because some of the Latino districts in appellees' alternate House plan had citizen voting age populations that were too low, and therefore the districts were ineffective. However, the district court credited testimony that established districts with a 59% Latino VAP were viable and that each of the eleven proposed Latino House districts had Latino VAP of 60% or more. U.S.J.S. App. at 36a, 40a.[3] Thus, it properly concluded that all eleven of appellees' districts were "sufficiently large and geographically compact" to establish that the State plan denied Latinos equal electoral opportunity.

The district court properly conducted a local appraisal, taking into account relevant, specific factors regarding citizenship in determining liability under the "sufficiently large" prong of *Gingles*.[4]

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[3] Because there was little data about citizenship, the state's argument was based on what was termed "a somewhat unorthodox regression analysis." U.S.J.S. App. at 74a (Vinson , J., concurring). Based on this speculation, the state arrived at a non-citizenship rate for Hispanics of 55 percent. *Id*. at 38a n. 25; *id*. at 74a (Vinson, J., concurring). This calculation was used to justify creating 9 rather than 11 Hispanic districts in Dade County. The court rejected the state's insensitive figures, focusing instead on past election results.

[4] A district court's findings regarding the level of minority population necessary to comprise an effective majority should be overturned only if clearly erroneous. *Fletcher v. Golder*, 959 F.2d 106, 110 (8th Cir. 1992). Here, the district court's liability determination should be affirmed; it is not clearly erroneous. Amici do not take the position that proof of viability of a district is necessary to demonstrate that a protected class is sufficiently large and geographically compact. For example, the demonstration that a protected class is a majority of the total population of a district has been held sufficient to demonstrate the first prong of *Gingles*. *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988) *cert. denied*, 492 U.S. 905 (1989).

C. Using Total Population, Voting Age Population and Electoral History Data in Redistricting Preserves Important Constitutional Values

Historically total population has been the relevant determinant for assessing one-person, one-vote compliance both in congressional reapportionment under Article I, § 2 of the United States Constitution, and in local and state reapportionment under the Fourteenth Amendment to the United States Constitution. The "population base for purposes of apportionment has always included all persons, including aliens. . . . " *Federation for American Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C.) (three-judge court), *appeal dismissed*, 447 U.S. 916 (1980). When Congress passed the Fourteenth Amendment, it chose to count the "whole number of persons" for purposes of congressional apportionment. U.S. Const. amend. XIV, § 2. The use of "voters" or "citizens" instead of "persons" was debated and rejected. *FAIR*, 486 F. Supp. at 576. The principle of representation based on total persons is grounded in the Constitution. Most recently, in *Voinovich v. Quilter*, 61 U.S.L.W. 4199 (U.S. Mar. 2, 1993), this Court required a remand of the case, based on a **total population** deviation of State legislative districts which exceeded 10% of the ideal district size. 61 U.S.L.W. 4203[5].

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[5] This Court has acknowledged that in using total population figures for apportionment purposes, actual voters might be spread disproportionately across districts. *Gaffney v. Cummings*, 412 U.S. 735, 746-49 (1973). While recognizing that age, alienage,

Here, Florida used U.S. census total population figures for reapportionment purposes, as required under state law. Fla. Stat. Ann. ch. 10.1001 (1)-(2) (Harrison's 1992 Cumulative Pocket Part.).

Typically, at the time of redistricting only two types of demographic data are available – total population data and voting age population data. Citizenship population data is generally not available. If at the time redistricting takes place, state reapportionment bodies are faced with data reflecting the possibility of creating districts with Latino supermajority total populations and voting age populations, but are permitted to act on a presumption that Latino non-citizenship rates do not require the creation of these potential Latino majority districts, Latino communities are likely to be divided and their vote diluted. This would communicate that Latino communities are of less value and importance to our society.

Representatives of electoral districts serve both citizens and non-citizens, minors and adults. All persons regardless of citizenship status or age have the right to petition their government. As the court in *Garza v. County of Los Angeles*, 918 F.2d 763, 775 (9th Cir. 1990) *cert. denied*, 498 U.S. ___, 111 S.Ct. 681 (1991), stated:

> [B]asing districts on voting population rather than total population would disproportionately affect these rights for people living in the Hispanic district. Such a plan would dilute the

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and nonresidence can create unequal voting populations across districts when apportionment is based on total population, this Court in *Gaffney* declined to find unequal voting populations unconstitutional.

> access of voting age citizens in that district to their representative, and would similarly abridge the right of aliens and minors to petition that representative. For over a century, the Supreme Court has recognized that aliens are "persons" within the meaning of the fourteenth amendment to the Constitution, entitled to equal protection. *See Yick Wo v. Hopkins*, 118 U.S. 356, 368, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886). This equal protection right serves to allow political participation short of voting or holding a sensitive public office.

[citations partially omitted.]

Finally, a third set of data is normally available at the time of reapportionment – electoral history data – including voter registration information, turn-out analyses, and electoral results. That data in conjunction with population information and other evidence, demonstrated the existence of racial bloc voting which would deny Latinos electoral opportunities if their votes were submerged into non-Latino districts. It also demonstrated that Latino districts with a VAP of 59% or greater are viable Latino districts, with effective Latino majorities. Based on the totality of circumstances the district court properly found liability and ordered a remedy.

An automatic adjustment for citizenship would have violated the totality of the circumstances standard and created a race-based eligibility presumption against Latinos not applicable to other segments of the population, in violation of the Fourteenth Amendment.

II

THE DISTRICT COURT ENTERED APPROPRIATE REMEDIAL RELIEF

Appellants argue here that the court should have permitted the State legislature the opportunity to submit a remedial plan and that the remedy chosen was inappropriate because: (1) it impacted on more districts than necessary to remedy the violation and (2) it fragmented segments of the white community who are not a protected class under the Voting Rights Act. Given the exigent circumstances and the failure of the state to timely submit a non-violative plan, a court ordered remedy was appropriate.

A. Violations of Section 2 Require A Complete Remedy

The legislative history of the 1982 amendments to Section 2 of the Voting Rights Act makes clear that a district court must use its equitable powers to fully remedy any violations of the Act. As stated in the Senate Report accompanying the Act:

> The Court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.

S. Rep. at p. 31.

Thus, the general principles governing the equitable powers of federal courts are well settled. In fashioning and effectuating their voting rights decrees, federal

courts are to be guided by equitable principles. *See Rogers v. Lodge*, 458 U.S. 613, 627-28 (1982). Essentially, voting rights remedies should be determined by the nature and scope of the constitutional violation. *Id.*, *Milliken v. Bradley*, 433 U.S. 267, 280 (1977). The remedy must therefore be tailored to cure the "condition that offends the Constitution." *Rogers*, 458 U.S. at 627. Federal courts in voting rights cases have used a variety of remedies to effectuate their orders. Federal courts may, where appropriate, enjoin elections, set aside elections, and even adopt their own temporary redistricting plan. *Hathorn v. Lovorn*, 457 U.S. 255, 270 (1982); *Upham v. Seamon*, 456 U.S. 37, 43-4 (1982); *Connor v. Finch*, 431 U.S. 407, 425 en. 426 (1977); *Mahan v. Howell*, 410 U.S. 315, 332 (1973); *Reynolds v. Sims*, 377 U.S. 533, 585, 1394 (1964); *Hammer v. Campbell*, 358 F.2d 215, 224 (5th Cir. 1966); *Terrazas v. Slagle*, 789 F.Supp. 828 (W.D. Tex. 1992).

In *Kirksey v. Board of Supervisors*, 554 F.2d 139 (5th Cir.) (en banc), the court struck down a remedial redistricting plan proposed by a local board of supervisors and adopted by the district court to remedy a one-person, one-vote violation. It found there had been a history of denial of equal political opportunity to black voters in Hinds County, Mississippi. It also found that the supervisors' reapportionment plan, adopted as the court-ordered plan, would have the effect of perpetuating the denial of access to the political process. *Kirksey, supra*, 554 F.2d at 148.

The plan the court rejected created two districts that had black voting age populations of slightly under 50%. The expert witness concluded that in these districts it would have been "unlikely if not impossible for blacks to

ever elect a candidate of their choice." *Kirksey, supra*, 554 F.2d at 149.

Not only did the court find that the remedial plan was invalid on constitutional grounds, but also that it was invalid because it was an abuse of discretion for the district court in exercising its remedial power to "approve a plan which tended to carry forward into the future the long-lived denial of black access to the political process." 554 F.2d at 152.

These cases establish the equitable principles to be employed by a district court in fashioning a remedy. A court-ordered remedy should, to the greatest possible extent, remedy the found violations of the Voting Rights Act. Any court adopted remedy cannot perpetuate a denial of equal opportunity and should be analyzed for compliance with the Voting Rights Act. A remedial redistricting plan should create winnable minority districts.

B. Section 2 Analysis of Remedial Plans

In the usual Section 2 case involving redistricting, under the totality of circumstances test of the statute, plaintiffs will have demonstrated that members of a protected class have been denied an equal opportunity to participate in the political process and elect representatives of their choice. In this circumstance, the primary remedial criteria is whether the plan adopted creates minority districts in which the protected class has "an effective majority." *Ketchum v. Byrne*, 740 F.2d 1398, 1410 (7th Cir. 1984), *cert denied*, 471 U.S. 1135 (1985). A district has an effective majority when the protected class's share

of the district's population is large enough to provide the protected class with a realistic opportunity to elect an official of their choice. *Id.* In determining that share, a court may weigh a number of factors including: the minority population, the minority voting age population, the minority voter registration, and turn-out patterns. *Id.* at 1413.

If there is more than one protected class, district courts should undertake a searching examination of the same Senate factors specified by Congress to determine liability, to determine the appropriate remedy. See *supra* part I, § A. Following normal equity practice, these factors should be assessed on a case by case basis. These factors also should be applied in a totality of circumstances approach to determine the appropriateness of a suggested remedy.

The initial analysis in circumstances where there is more than one protected class is to determine whether the protected classes are politically cohesive or whether they are politically antagonistic. If it is determined that there is no political cohesion between the protected classes, distinct districts normally should be drawn for the two groups. If distinct districts cannot be drawn, i.e. where the drawing of districts for one group conflicts with the drawing of districts for the other group, then the Court must fashion a remedy that ensures that no group is disproportionately excluded from the political process. The Court must weigh the relative political opportunity of the two classes. Such relative political opportunity is measured by comparing the ability of the different classes to elect representatives to the size of each of their total

populations in the jurisdiction. The class with least ability to elect representatives of its own choice normally should be favored when resolving conflicts between the two classes and should not be disproportionately excluded in the drawing of remedial districts.

C. Appropriate Remedial Procedure

Subsequent, to a finding of liability under Section 2, a jurisdiction found in violation of the Act is normally given an opportunity to propose a remedy to the violation. Such remedy is subject to review to determine whether the plan is in compliance with Section 2. *Gingles v. Edmisten*, 590 F. Supp. 345, 376 (E.D.N.C. 1984) *affirmed in part sub nom, Thornburg v. Gingles*, 478 U.S. 30 (1986). However, the remedy proposed must be submitted to the district court in time to ensure that a non-discriminatory plan is in place prior to the next scheduled election. If a non-violative plan is not submitted, the district court has the duty to order the implementation of a non-violative plan. *See Edmisten*, 590 F. Supp. at 376; *see also, Camp v. Wesch*, 60 U.S.L.W. 3768 (U.S. May 19, 1992) (summarily affirming a district court remedy which ordered a redistricting plan to be used for upcoming elections, unless the

State legislature adopted a timely constitutional plan);[6] *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex. 1992).

Therefore, while a jurisdiction should be allowed to submit a proposed remedy for court review, that opportunity must be limited to timely submissions, which will remedy a Voting Rights Act violation prior to upcoming elections. *See also* Part III, § A, sub-section 1, *infra*.

D. Application of Remedial Standards

Given the totality of circumstances and the failure of the State to submit a non-violative plan at the time the district court rendered its decision, it appropriately ordered remedial relief. There is no assertion that African-American voters were denied districts in which they have effective majorities by the court's adoption of Latino House districts with effective majorities, and that as a consequence they were denied relative political opportunity as compared to Latinos.[7]

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[6] The United States District Court in *Wesch*, on March 9, 1992, adopted a statewide congressional redistricting plan for Alabama. The Alabama Legislature had passed a congressional redistricting plan prior to the rendering of the district court's decision, but that plan had not yet been precleared. Slip. Op. at 9-10, par. 22. The district court entered an order which required that its adopted plan be used for the 1992 congressional elections unless "the Alabama Legislature duly [enacted] a redistricting plan for the conduct of congressional elections in 1992 and [had] the same precleared no later than 12:00 noon, Central Time, March 27, 1992."

[7] There is also no assertion that white voters were harmed because in the court's remedial plan they are underrepresented and were intentionally discriminated against. Subsegments of

III

CIVIL RIGHTS PLAINTIFFS HAVE A RIGHT TO CHOOSE A FEDERAL FORUM TO LITIGATE FEDERAL CLAIMS AND ARE NOT PRECLUDED BY STATE COURT DECISIONS TO WHICH THEY ARE NOT A PARTY

Appellants make the unprecedented argument that the United States, a non-party to the Florida State proceeding, is precluded from challenging Florida's redistricting under federal law in federal district court. Appellants are wrong. First, to do what Appellants suggest would impose an exhaustion requirement on voting rights plaintiffs contrary to the explicit statutory language of the Voting Rights Act and decisions of this Court. Second, it would give preclusive effect to a state court decision beyond the scope envisioned under the full faith and credit requirements of federal law. Third, it would effectively impose a requirement on potential civil rights plaintiffs to intervene in ongoing proceedings contrary to this Court's opinion in *Martin v. Wilks*, 490 U.S. 755 (1989). Finally, it would extend the *Rooker-Feldman* doctrine in an unprecedented manner, contrary to the due process clause of the United States Constitution.[8]

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white voters are not a protected class under § 2 and no result claim can be, or in any case, has been proven. There is absolutely no proof of polarized voting between specific subsegments of the white community and others, assuming that such segments could be considered a protected class.

[8] By focusing on the litigative status of a non-party to the State proceedings, Amici do not imply any position with respect to those who were parties to the State proceedings.

A. The United States District Court Was Not Obligated To Abstain In-Lieu Of State Court Proceedings

It is A general principle of federal law that a plaintiff who properly invokes the jurisdiction of the federal court to adjudicate federal claims should not be divested of that jurisdiction. As the Court in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) explained:

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that "When a Federal court is properly appealed to in a case over which it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40, 53 L. Ed. 382, 394, 29 S. Ct. 192, 48 LRA NS 1134.

375 U.S. at 415 (footnote omitted).

Here, plaintiff United States had clearly asserted federal claims and was thus entitled to adjudicate its claims in federal court unless the district court was required to abstain.

Abstention is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy

before it. *County of Allegheny v. Mashuda*, 360 U.S. 185, 188 (1959); *Moses H. Cone Hospital v. Mercury Constr.*, 460 U.S. 1, 14 (1983). Abdication of the obligation of the District Court to adjudicate the controversy properly before it "can be justified only in the exceptional circumstance where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Mashuda*, 360 U.S. at 188-189. The "task in such cases is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that . . . justify the *surrender* of that jurisdiction." *Moses H. Cone Hospital*, 460 U.S. at 25-26 (emphasis in original). Moreover, where federal law provides the rule of decision on the merits, abstention should be avoided. *Id.* at 23-26. Here, there are no "exceptional" circumstances nor are there the "clearest of justifications" necessary to divest plaintiff, United States, of its chosen federal forum.

1. The Potential Impact Of Delay On The Right To Vote Precluded Deferral

Abstention is improper if the effect of abstention is to delay adjudicating important federal voting rights. Although the State has an interest in reapportioning its Congressional seats; *see, e.g., Scott v. Germano*, 381 U.S. 407 (1965); *Bianchi v. Griffing*, 393 F.2d 457 (2d Cir. 1968); that interest becomes subordinate to the countervailing federal interests of voting rights plaintiffs when the State has so delayed asserting its interests as to potentially impair plaintiffs' rights; *Harman v. Forssenius*, 380 U.S. 528

(1965); *Badham v. U.S. Dist. Ct. For N. Dist. of Cal.*, 721 F.2d 1170 (9th Cir. 1983); *Edwards v. Sammons*, 437 F.2d 1240 (5th Cir. 1971); *Cavanagh v. Brock*, 577 F. Supp. 176, 180 n.4 (E.D.N.C. 1983) (three judge court); *Skolnick v. State Electoral Bd of Illinois*, 336 F. Supp. 839, 869-871 (N.D. Ill. 1971) (three judge court). *See also Badham*, 721 F.2d at 1172-73 ("The dangers posed by an abstention order are particularly evident in voting cases. . . . We . . . hold that before abstaining in voting cases, a district court must independently consider the effect that delay resulting from the abstention order will have on the plaintiff's right to vote. Although we are mindful of the important principles of federalism implicit in the doctrine of abstention, these principles may be outweighed in an individual case by the countervailing interest in ensuring each citizen's federal right to vote."); *Edwards*, 437 F.2d 1240; *Brock*, 577 F. Supp. at 180 n.4; *Skolnick*, 336 F. Supp. at 869-871.

Most recently, this Court in *Growe v. Emison*, 61 U.S.L.W. 4163, 4167 (U. S. February 23, 1993), similarly emphasized that a Federal district court would be "justified in adopting its own plan if [it] had been apparent that the State court, through no fault of the District Court itself, would not develop a redistricting plan in time for the primaries," and that a Federal Court was required to defer its adjudication, *not* abstain. *Id.*

Here, at the time the district court was adjudicating the claims of the United States, there were effectively no ongoing State proceedings, but there were impending elections. Thus, the district court properly adjudicated the federal claims before it.

2. The United States Was Not Precluded By The Full Faith And Credit Statute

This Court in *Growe* explained the appropriate procedure to be followed by a Federal district court when there are similar redistricting claims in both federal and state forums. Once a state court adopts a redistricting plan, assuming no preclearance requirement, the plan becomes the law of that state. 61 U.S.L.W. at 4166. At that time, "the elementary principals of federalism and comity embodied in the full faith and credit statute, 28 U.S.C. § 1738, obligated the federal court to give the judgment *legal effect*." *Id.* (emphasis in original). Nevertheless, after the State court renders a judgment, the federal court is "empowered to entertain . . . plaintiffs' claims relating to legislative redistricting . . . to the extent those claims challenge[ ] the *state court's* plan." *Id.* (emphasis in original).

Here, plaintiff United States was not a party to the state court proceeding and therefore, was not bound by the full faith and credit statute. According to appellants, a judgment was rendered by the Florida court. Therefore, under *Growe*, plaintiff United States was properly before the federal court "to the extent those claims challenged the *State Court's* plan."

a. Plaintiff United States Is Not Bound By The Full Faith And Credit Statute

The preclusive effect of a state court judgment in a subsequent federal court action is determined entirely by the full faith and credit statute, 28 U.S.C. § 1738. This

statute in turn requires that the federal court look exclusively to state law to determine the preclusive effort of a state court judgment. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985); *Kremer v. Chemical Construc. Corp.*, 456 U.S. 461 (1982). As the Court stated in *Kremer*: "It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken." 456 U.S. at 481-82. Similarly, the Court in *Marrese* stated: "Section 1738 embodies concerns of comity and federalism that allow States to determine, subject to the requirements of the statute and the Due Process Clause, the preclusive effect of judgments in their own courts." 470 U.S. at 380. Thus, a federal court cannot give greater preclusive effect to a state court judgment than the state court itself would give it. *Migra* v. *Warren City School Dist. Board of Educ.*, 465 U.S. 75 (1984); *Marrese*, at 384-386. It may deny preclusive effect, however, if requirements of due process are not met. *Kremer, supra*, 456 U.S. at 482-83.

Here, appellants make no assertion that the United States was bound by *res judicata* principles of Florida law either as a party or as being in privity with a party. As this Court stated in similar circumstances, regarding the preclusive effect of a State court decision under the Voting Rights Act to which the United States was not a party, "The [United States] Attorney General is not bound by the resolution of Section 5 issues in cases to which he [or she] was not a party." *Hathorn v. Lovorn*, 457 U.S. at 268 n.23 (1982).

b. Precluding Plaintiff United States Would Violate Due Process Requirements And Be Contrary To This Court's Decision In *Martin v. Wilks*

"[A] state may not, consistently with the 14th Amendment, enforce a judgment against a party named in the proceedings without a hearing or opportunity to be heard, so it cannot without disregarding due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein." *Postal Telegraph-Cable Company v. City of Newpost*, 247 U.S. 464, 476 (1917). Here, there is no assertion that the United States was either a party or in privity with a party in the state court proceedings. Full faith and credit will not be afforded to give preclusive effect to a decision which does not, as here, meet due process requirements. Moreover, it is of no moment that the United States did not intervene in the State court proceedings.

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.

Chase National Bank v. Norwalk, 291 U.S. 431, 441 (1934); *Martin v. Wilks*, 490 U.S. at 763, 765 (1989) ("a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined. . . . Joinder as party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and

bound by a judgment or decree"). This is especially true here where the United States specifically chose a federal forum to litigate its federal claims. Civil rights plaintiffs have a *right* to choose a federal forum. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415 (1964); *Willcox v. Consolidated Gas Co.*, 212 U.S. 219, 240 (1909) ("When a Federal Court is properly appealed to in a case over which it is its duty to take jurisdiction . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.")

c. The District Court Had Jurisdiction

Appellants argue that the district court had no subject matter jurisdiction under the *Rooker-Feldman* doctrine because plaintiff United States was collaterally attacking the state court decision. Their argument is fatally flawed because the United States was not a party in the state court action, which precludes application of the *Rooker-Feldman* doctrine.

The *Rooker-Feldman* doctrine prevents an unsuccessful party in a state court action from asking a United States District Court to act as an appellate court, to review the judgment of the state court in an action in which they were a party. Since there was no prior state court proceeding to which the United States was a party, the *Rooker-Feldman* doctrine is necessarily inapplicable to the case. The basis of the *Rooker-Feldman* doctrine is that a party who lost in a state court proceeding can only obtain review of the state court's judgment in the United States Supreme Court under 28 U.S.C. sec. 1257, and cannot seek what in effect would be an appellate review of that

judgment in a United States District Court by claiming that the judgment itself violated the party's federal rights. In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), a party who lost his case in the Indiana courts brought a federal court suit, alleging that the judgment violated the contracts clause and the due process clause. In holding that the federal court lacked subject matter jurisdiction to hear the case, the Supreme Court noted that the parties to the federal court litigation were the same as the parties to the state court litigation, and stated: "If the constitutional question stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them, and their decision, whether right or wrong was an exercise of jurisdiction . . . Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. . . . To do so would be an exercise of appellate jurisdiction." 263 U.S. at 415-416.

In *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), a law school graduate, in proceedings before the District of Columbia court system, sought a waiver of a rule that made him ineligible to take the District of Columbia bar examination. When he lost there, he brought another suit in the United States District Court for the District of Columbia, seeking review of that decision. The Supreme Court held that since the District of Columbia court system was a "state" for purposes of 28 U.S.C. § 1257, and since the proceedings before that court were "judicial" in nature, review of that decision could be sought only in the Supreme Court. The district

court lacked subject matter jurisdiction to review it in an original action.

Here, the United States was not a party to the state court proceeding and is therefore not precluded by the *Rooker-Feldman* doctrine.

CONCLUSION

For the forgoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BOLLEY JOHNSON, *et al.*,
Appellants,
v.
MIGUEL DE GRANDY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLEES

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLEES

The Lawyers' Committee for Civil Rights Under Law seeks leave to file the annexed brief as *amicus curiae* in support of the appellees.

The Lawyers' Committee is a non-profit organization created in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure equal rights to all Americans. Protection of the voting rights of citizens has been an important aspect of the work of the Committee. The Committee has provided legal representation to litigants in numerous voting rights cases throughout the nation over the last 30 years, including cases before this Court, *see, e.g., Clark v. Roemer,* 500 U.S. ——, 111 S. Ct. 2096 (1991); *Clinton v. Smith,* 488 U.S. 988

(1988); *Connor v. Finch*, 431 U.S. 407 (1977). The Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, *see, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986); *Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

Although the Committee is not a party to this appeal, the Committee represented several African-American citizens in other aspects of the Florida redistricting litigation that led to the appeals now before this Court.[1] The issues presented in this appeal are of great importance to the Committee's work on behalf of minority voters throughout the nation. In its effort to overturn the judgment below, Florida seeks the adoption of a greatly enlarged *per se* defense to Section 2 claims based on alleged proportional representation of Hispanics, a minority group that did not elect its first representative to the state legislature until 1982. Further, Florida and its *amici* urge this Court to limit challenges to legislative redistricting schemes based on the fundamentally mistaken notion that enforcement of the Voting Rights Act is somehow responsible for racially polarized voting and racial politics, rather than a necessary response to those conditions. These arguments ignore the historical record of minority exclusion from equal political opportunity that guided Congress in amending Section 2 of the Voting Rights Act in 1982, and threaten the hard-won progress that has been made under the Voting Rights Act in securing equal access to the political process for minorities. Finally, Florida urges a highly restrictive interpretation of the manner in which minority voters may satisfy the first of the factors set forth in this Court's decision in *Thornburg v. Gingles*. Florida's interpretation misconstrues the *Gingles* standard and is at odds with the broad remedial purpose of the Voting Rights Act.

Acceptance of the appellants' arguments would impair the Committee's ability to vindicate the rights of the minority citizens it represents throughout the nation. The Committee therefore has a substantial interest in the outcome of this case. We accordingly request that this motion for leave to file the attached brief be granted.

Counsel for appellants Florida House of Representatives and the Executive Appellants, as well as counsel for the De Grandy appellees, the United States, and the Florida State Conference of NAACP Branches, *et al.* have consented to the filing of this brief.[2]

Respectfully submitted,

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[1] The Committee represented Gwen Humphrey and other intervenors (collectively referred to as the "Humphrey intervenors") in the proceedings below. In those proceedings, the claims of the Humphrey intervenors were limited to the dilution of African-American voting strength in the Florida House districts drawn in Escambia County and the Florida Senate districts drawn in the Tampa Bay area. Thus, while the Committee did not assert claims with respect to the Dade County area, it participated in the trial that resulted in this appeal and those in Nos. 92-767 and 92-593.

[2] The letters of consent have been filed separately with the Court. In view of the large number of parties listed in this matter, we have also filed this motion out of an abundance of caution.

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BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* is set forth in the accompanying motion for leave to file brief *amicus curiae*.

SUMMARY OF ARGUMENT

This Court should reject appellants' arguments seeking the adoption of a greatly enlarged *per se* defense of proportional representation in cases brought under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Those arguments are inconsistent with this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and conflict with the policies underlying Section 2.

Contrary to the arguments of appellants and their *amici*, a district court does not adopt an improper principle of "maximizing" minority voting strength whenever it rules that the failure to create additional minority districts violates Section 2. To the contrary, courts act well within the bounds of their discretion under Section 2 when they examine districting plans to determine if they have a discriminatory impact on minorities. That examination is properly conducted under the standards set forth in *Gingles*. Neither proportional representation nor the lack of it is the touchstone for this analysis.

Appellants and their *amici* also err in suggesting that a court's findings on the three factors identified as central to Section 2 claims in *Gingles* should be treated as minor technical matters in the ultimate vote dilution inquiry. To the contrary, a court's findings on the three *Gingles* factors—including findings of highly racially polarized voting and the inability of minority voters to elect candidates of their choice in districts where they do not comprise a majority of the population—are properly entitled to great weight in an ultimate finding of vote dilution. Those findings are direclty tied to the question of whether minority voters have an equal opportunity to elect candidates of their choice to office, the statutory standard for a Section 2 claim.

In this case, the district court properly considered the presence of the *Gingles* factors, as well as strong evidence of other factors relevant under the totality of circumstances test of Section 2, in concluding that Florida's redistricting plan violated Section 2. As the district court found, racial and ethnic factors predominate over all others in Dade County politics. Indeed, because of racially polarized voting patterns, not a single Hispanic legislator was elected from South Florida until 1982, when Florida replaced its multi-member legislative districts with single-member districts. The undisputed facts show that even the remedial plan adopted in this case would not provide Hispanics in Florida with proportional representation.

This Court should also reject appellants' efforts to engraft new and unwarranted requirements onto the first *Gingles* factor—whether minorities are sufficiently numerous and geographically compact to form a majority in a single-member district. The district court's finding that additional districts could be drawn containing effective Hispanic voting majorities was not clearly erroneous. Imposing on Section 2 plaintiffs the heightened evidentiary requirement of demonstrating that single-member districts containing citizen voting age majorities can be created is inconsistent with this Court's reasoning in *Gingles* and is not required by the language of Section 2.

ARGUMENT

I. FLORIDA DID NOT ESTABLISH A VALID DEFENSE OF PROPORTIONAL REPRESENTATION

A. The Vote Dilution Claim in this Case Is Not Based on a Principle of Maximizing Minority Voting Strength

Under the pretense of challenging a dangerous "principle" of "maximizing minority voting strength" supposedly adopted by the court below, Florida seeks this Court's endorsement of a dramatically enlarged *per se* defense to Section 2 claims. *See* Brief of Appellants at 29-30. The district court, however, embraced no "maximization" principle. At bottom, Florida's claim is merely that the district court erred by not finding that Hispanics enjoy proportional representation under the state's reapportionment plan. No such finding was compelled by the facts, however, as we discuss in Section I.C., *infra*. The state's arguments to the contrary rest on an unwarranted expansion of the limited defense of proportional representation recognized in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Before turning to that essentially fact-bound issue, however, it is necessary to address the exaggerated claims of Florida and its *amici* concerning the so-called "maximization principle" they erroneously attribute to the dis-

trict court or, at some points, to this Court's decision in *Thornburg v. Gingles*. The district court, according to these claims, determined the existence of a Section 2 violation by ascertaining whether Florida had created the maximum possible number of minority districts and invalidating the state's redistricting plan upon finding that it had not.[1]

The district court nowhere referred to or embraced any such "maximization" principle; indeed, it carefully followed the *Thornburg v. Gingles* standards which this Court recently ruled applicable to redistricting cases. *See Growe v. Emison*, 507 U.S. ——, 113 S.Ct. 1075 (1993); *Voinovich v. Quilter*, 507 U.S. ——, 113 S.Ct. 1149 (1993). Florida and its *amici* simply invite this Court to hold that an illicit "maximization" principle has been adopted whenever a court rules that the failure to create additional minority districts violates Section 2. The invitation should be rejected. Courts act well within the bounds of their discretion under Section 2 when they examine redistricting plans to determine if they have a discriminatory impact on minorities. *See, e.g., Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989) (three-judge court), *aff'd mem.* —— U.S. ——, 111 S.Ct. 662 (1991) (Arkansas legislative redistricting plan deprived minority voters of equal opportunity to elect candidates of choice); *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss.) (three-judge court), *aff'd mem. sub nom. Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984) (Mississippi congressional redistricting plan unlawfully limited minority voting strength). These cases, and others,[2] all involved claims that redis-

[1] Like the state, *amici* American Jewish Congress and B'nai B'rith repeatedly refer to the "maximization standard" allegedly "adopted" by the district court. *See, e.g.*, Brief of American Jewish Congress ("AJC") at 5, 23; Brief of B'nai B'rith at 19.

[2] *See also, e.g., Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court) (congressional redistricting plan); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985) (Chicago city council redistricting plan); *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 681 (1991) (Los Angeles County Commission redistricting plan); *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1147 (N.D. Ill. 1983) (three-judge court) (Illinois legislative redistricting plan).

tricting plans violated the Voting Rights Act by unduly limiting the number of districts in which minority voters would have an opportunity to elect candidates of choice to office. Both before and after this Court's decision in *Gingles*, such claims have been well within the mainstream of Section 2 jurisprudence.[3]

Florida and its *amici* fail to suggest a principled basis for determining when a Section 2 challenge to a redistricting plan is based on an impermissible "maximization" theory, and when it instead is meritorious. Courts should neither apply a maximization principle, nor presume that any increase in the number of majority minority districts in a plan is an illicit foray into racial "segregation."[4] The very purpose of this Court's decision in *Thornburg v. Gingles* was to set out standards that would be used for establishing the dilutive effect of an electoral structure, instead of automatic presumptions based on proportional representation or the lack of it.

[3] Cases challenging the dilution of minority voting strength in single-member district plans were also regularly litigated prior to the amendment of Section 2 in 1982. *E.g., Robinson v. Commissioners Court*, 505 F.2d 674 (5th Cir. 1974) (failure to create majority black county commissioners' district unlawfully diluted minority voting strength).

[4] As Justice Stevens noted in *Mississippi Republican Executive Comm. v. Brooks*, the fact that a court orders a districting plan that increases minorities' opportunity to elect a candidate of choice does not mean that the district court has embraced a requirement of proportional representation, 469 U.S. at 1004 (Stevens, J., concurring).

B. *Thornburg v. Gingles* Provides the Appropriate Framework for Analysis of Challenges to Redistricting Plans

Amici AJC and B'nai B'rith attack *Gingles* itself and urge that its standards should be rewritten with respect to single-member district plans. This Court, however, has specifically confirmed that the *Gingles* framework applies in Section 2 challenges to redistricting plans. *Growe v. Emison*, 507 U.S. ——, 113 S.Ct. 1075; *Voinovich v. Quilter*, 507 U.S. ——, 113 S.Ct. 1149. And the guidelines set out in *Thornburg v. Gingles* have not failed merely because Florida believes it has a defense of proportional representation to which the district court gave insufficient weight.

Amicus AJC states that the court below created additional Hispanic districts in South Florida "merely because all three *Gingles* criteria could be satisfied in an additional two districts." Brief of AJC at 19. This statement is not only flatly incorrect—the court made numerous specific findings on the other factors Congress identified as relevant to a Section 2 violation[5]—but also totally misunderstands the significance of the three *Gingles* criteria. In *amicus* AJC's terminology, the district court found a Section 2 violation "merely" because voting is racially polarized, with Anglos bloc voting to a high degree against candidates preferred by Hispanics; "merely" because Hispanic voters have an opportunity to elect candidates of their choice only in districts with Hispanic majorities; "merely" because ethnic factors predominate over all others in Dade County politics; "merely" because Florida in addition has a long history of language-based discrimination against Hispanics, continuing to the present day; "merely" because Hispanics continue to be disadvantaged by substantial economic disparities between Hispanic and non-Hispanic white citizens in South Florida;

[5] *See* Appendix to Jurisdictional Statement ("J.S. App.") at 30a-55a.

and "merely" because overt racial appeals continue to pervade election contests between Hispanic and non-Hispanic candidates in the 1990s in South Florida.[6]

We submit that these are not minor considerations. The court's findings on the three *Gingles* factors—particularly its findings of highly racially polarized voting and the inability of Hispanic voters to elect candidates of their choice in any but Hispanic-majority districts—properly carry great weight in an ultimate finding of vote dilution. As this Court found in *Gingles*, the presence of racial bloc voting and the predictability of the defeat of minority-preferred candidates is at the core of a dilutive electoral structure. 478 U.S. at 48-51. Where such factors are present—and this is particularly true in the highly ethnically polarized politics of South Florida—the ethnic composition of a district may, for better or worse, control the outcome of elections in that district. It is precisely for this reason that Florida did not elect its first Hispanic representative to the Florida House this century until 1982 (*see* Stipulated Facts, J.A. at 27), its first Hispanic state senator until 1988 (*see In Re: Constitutionality of Senate Joint Resolution 26, Special Apportionment Session 1992*, No. 79,674, slip op. (Fla. S.Ct. May 13, 1992) (Shaw, C.J., dissenting), J.S. App. at 133a), and its first Hispanic congressional representative until 1989 (*see* Affidavit of Dario Moreno, J.A. at 186-190).

For these reasons, although the *Gingles* factors are not the only factors a court may consider under Section 2, they are far more than minor technical elements in the final vote dilution determination. Those factors are not only the starting point for a Section 2 claim, but are central in determining whether an electoral structure unlawfully dilutes minority voting strength. The existence of racially polarized voting, and the persistent inability of

[6] *See* J.S. App. at 49a-51a, 53a, 79a; Affidavit of Dario Moreno, Joint Appendix ("J.A.") at 175-77; Stipulated Facts, J.A. at 17.

minority voters to elect candidates except in majority minority districts, are directly tied to the question of whether minority voters have an equal opportunity to *elect* candidates of their choice to office—the statutory standard enacted in Section 2.[7] And there is nothing inherently alarming in a district court decision that finds a Section 2 violation based in part, although not exclusively, upon strong and undisputed evidence that racial and ethnic considerations predominate over all others in Dade County politics.

Amici AJC and B'nai B'rith, however, suggest that enforcement of the Voting Rights Act is responsible for racial politics; they contend that creating districts where black and Hispanic voters are in the majority "segregates" minorities and deprives them of the political influence they could otherwise wield. This social theory is advanced as the justification for adopting a restrictive interpretation of Section 2. In particular, this theory is argued to justify reworking this Court's Section 2 jurisprudence so that a favorable finding on the three key *Gingles* factors would barely allow minorities inside the door of the courthouse, with the main part of their burden of demonstrating a Section 2 violation still before them. *Amicus* B'nai B'rith

[7] Florida and its *amici* err in suggesting that proving the three *Gingles* factors is a minor technical matter entitled to little or no weight in a court's inquiry into the totality of circumstances. To the contrary, proof of the three *Gingles* factors is a substantial undertaking that ordinarily requires expert statistical analysis, fact testimony on the workings of the local political processes, and preparation of potential alternative redistricting plans meeting constitutional and statutory requirements. These are by no means minor evidentiary hurdles. *See, e.g., Overton v. City of Austin*, 871 F.2d 529, 537-38 (5th Cir. 1989) (proof failed to establish legally significant white bloc voting); *Sanchez v. Bond*, 875 F.2d 1488, 1493-94 (10th Cir. 1989), *cert. denied*, —— U.S. ——, 111 S. Ct. 340 (1990) (proof failed to demonstrate political cohesion among minority voters); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 944-45 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989) (proof failed to establish ability to draw black majority single-member district).

even asserts that *Gingles* itself "lessens the prospects of long term cross-racial political unity" by recognizing racially polarized voting as a factor favoring a finding of vote dilution. Brief at 13.[8]

To attribute racial politics in Dade County, or elsewhere in the United States for that matter, to the creation of black and Hispanic majority districts is the sheerest fiction. Enforcement of Section 2 of the Voting Rights Act, and the creation of majority minority legislative If this were credible, Florida would be able to point to a long history of successful legislative races by minorities in white majority legislative districts predating the creation of majority minority districts. In fact, in Florida minority legislators have been elected almost exclusively from districts with majorities or near-majorities of minority citizens. *See* J.S. App. at 131a-133a (Opinion of Florida Supreme Court dated May 13, 1992, dissenting opinion of Shaw, C.J.). Indeed, not a single Hispanic legislator was elected to the Florida House of Representatives from South Florida this century until the state eliminated its multi-member legislative districts and instituted a system of single-member districts in 1982. Stipulated Facts, J.A. at 27.[9]

The near-total absence of Dade County minority legislators from the statehouse during the first eight decades of this century does not reflect an era of racial harmony that has been destroyed by enforcement of the Voting

[8] *See also* Brief of AJC at 53, which states that, as construed by *Thornburg v. Gingles*, the Voting Rights Act "is itself a factor in encouraging the politics of race." *See also id.* at 52: "Under the *Thornburgh* [sic] plurality rule, there is little incentive for minority candidates to assert positions which appeal to a broad cross section of the electorate and to engage in cross-racial coalition building, for doing so would undermine a claim for a far safer majority-minority district."

[9] Similarly, from 1885 through 1982, only two African-American representatives were elected to the legislature from Dade County. Stipulated Facts, J.A. at 27.

Rights Act, but merely the previous submergence of minority voting strength and political aspirations through dilutive countywide and multi-member legislative elections. Hence, to blame enforcement of the Voting Rights Act, and the creation of majority minority legislative districts starting in the mid-1980s, for racial politics and racially polarized voting is historically insupportable.[10]

Further, the social theory that minorities are better off in "integrated" districts—by which is usually meant districts where white voters are in the majority—provides no legitimate basis for this Court's interpretation of the Voting Rights Act. Congress amended Section 2 to permit minority voters to challenge an electoral practice or structure that denies them an equal opportunity to *elect* candidates of their choice to office. The alleged desirability of a different political goal provides no principled basis for ratcheting up the evidentiary hurdles minority voters must overcome to establish a violation of Section 2.

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[10] Compare Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* 198 (1990) ("Historically, race has been the central theme of Mississippi politics. Writing in 1949, political scientist V.O. Key, Jr. concluded that 'the beginning and the end of Mississippi politics is the Negro.' . . . [T]he political massive resistance statutes of the 1966 session of the Mississippi Legislature, together with existing discriminatory election structures . . . erected strong barriers to the effectiveness of the new Black vote [after the passage of the Voting Rights Act of 1965]. . . . Overcoming these barriers took years of litigations. . ."); J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second, in Minority Vote Dilution* 27, 31 (Chandler Davidson ed., 1989) ("Reconstruction and post-Reconstruction Southern Democrats used at least sixteen different techniques to hamper black political power. . . . [and] some of them, adopted as long as a century ago, are still in effect. . . Although they all had the same purpose—the minimization of officeholding by black or black-influenced white officeholders—the specific schemes varied because of differences in the black percentage of the population and its geographic distribution.")

C. The State Did Not Make Out a Valid Defense Based on Alleged "Proportional Representation" of Minorities in the Florida House Plan

Thornburg v. Gingles indicates that sustained electoral success that has resulted in consistent proportional representation of minorities may be asserted as a defense to a Section 2 challenge. 478 U.S. at 77. Contrary to Florida's contention, however, the facts in this case did not require a finding that Hispanics have enjoyed "proportional representation" as a matter of law.

The context in which Florida asserts its defense of proportional representation is critical. Here, the district court found that appellees' proof satisfied all three *Gingles* factors, as well as relevant Senate Report factors, and ruled that the state's districting plan diluted Hispanic voting strength. Because the court's findings, including its ultimate finding of vote dilution, are protected by the "clearly erroneous" standard of review in Rule 52(a) of the Federal Rules of Civil Procedure, *Thornburg v. Gingles*, 478 U.S. at 79, the state's arguments concerning proportional representation can prevail only if the facts of this case required a finding of proportional representation as a matter of law. No such conclusion is supported by this record.

First, Florida's redistricting plan does not provide proportional representation to minorities in any sense recognized by this Court in *Gingles*. This Court recognized a defense of "sustained electoral success" in one of the multi-member districts at issue in *Gingles* where "the last six elections [had] resulted in proportional representation for black residents." 478 U.S. at 77. In that district, black residents constituted 36% of the population and had elected a black legislator to one of the district's three seats in each election for the previous 10 years. *Id.* at 74 n.35. Here, Hispanics constitute 12% of the population of Florida, and proportional representation in the 120-

member Florida House of Representatives therefore would consist of 14 seats. Florida's plan creates nine majority Hispanic House districts. Given these facts, it is unsurprising that Florida's defense of "proportional representation" was barely mentioned at trial and that the district court made no finding that Hispanics were proportionally represented in the challenged House plan.

Moreover, it is undisputed that prior to the 1992 elections Florida never had more than 7 Hispanic legislators from south Florida. *See* Stipulated Facts, J.S. App. at 27. No one argues that this constituted proportional representation for Hispanics. Indeed, prior to the 1992 redistricting, non-Hispanic whites in Dade County, who constitute less than a third of the county's population, comprised ten out of the twenty members of the Dade delegation to the state House. J.A. at 181 (Affidavit of Dario Moreno). Thus, even if the level of Hispanic representation in the state's current plan were "proportional," by no means has that level of representation been "sustained." The district court therefore did not err as a matter of law in declining to treat "proportional representation" as an absolute defense to Hispanics' Section 2 claim in this case.

Moreover, unless the district court was required to adopt the most restrictive of all possible interpretations of "proportional representation," Hispanics in Florida do not currently enjoy proportional representation under the state's plan. As noted above, with an Hispanic population of 12%, Florida now has nine districts out of 120 with a majority Hispanic population, or 7.5%. Florida's "proportional representation" defense therefore depends upon narrowing the focus either to Hispanic citizens of voting age—excluding any consideration of non-citizens or persons not yet of voting age—or to the Hispanic population percentages in the "Dade County area" rather than in the state as a whole. Neither of these measures is the only appropriate measure of proportional representation, and

accordingly the district court did not err by rejecting the state's proportional representation defense.

In determining whether a challenged plan provides proportional representation to minorities, it is appropriate to use total minority population as the measure of proportional representation. Total population is consistently used in this Court's one-person, one-vote jurisprudence as the measure of equal voting strength under the Fourteenth Amendment;[11] it is no less appropriate as a measure of equal voting strength under the Voting Rights Act. Indeed, recognizing an absolute defense of "proportional representation" based on the percentage of minority voting age population—putting aside the citizenship issue—would tend to create a built-in bias against minority representation, because minority groups tend to be younger on average than the white population. *See, e.g., Ketchum v. Byrne*, 740 F.2d at 1412.[12]

Persons ineligible to vote are nevertheless entitled to petition their legislators, to seek their assistance, and to endeavor to influence legislative policymaking. Capping minority representation in a redistricting plan by use of citizen voting age population instead of total population percentages would infringe those rights by treating those ineligible to vote as nonpersons.[13] *See Garza v. County of*

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[11] *See, e.g., Connor v. Finch*, 431 U.S. 407 (1977); *Richardson v. Burns*, 384 U.S. 73 (1966).

[12] In this case, the state's proportionality defense also fails if the statewide proportion of Hispanic residents of *voting age* (11.7%) may be a proper measure; again, only 7.5% of the House districts created have a Hispanic majority population. Only if *citizen* voting age population is the only appropriate measure of proportional representation can the state sustain its defense.

[13] Moreover, Florida itself uses total population as the measure for dividing its legislative seats among different regions of the state. Thus, recognizing a defense based on alleged proportional representation of citizens of voting age would allow the state to use inconsistent measures of voting strength for Hispanic and non-Hispanic citizens. Such differential treatment is clearly contrary to the policies behind the Voting Rights Act.

Los Angeles, 918 F.2d 763, 775 (9th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 681 (1991). Florida has presented nothing to establish that the court was required to adopt such an approach in assessing the state's proportional representation defense.

Furthermore, the appropriate reference for the state's defense of "proportional representation" is the percentage of Hispanics in the state as a whole, not their percentage in an arbitrarily defined sub-region of the state. A statewide framework is the only neutral reference point for determining the existence of proportional representation in a statewide legislative redistricting plan. Using a smaller region as a reference is subject to endless manipulation, given that some area could always be defined in which minority voters would appear to enjoy proportional representation.[14] Indeed, courts applying Section 2 to redistricting plans routinely refer to statewide minority percentages in describing the degree of representation afforded to minorities, regardless of whether the minority group is concentrated in a particular area of the state. *Jeffers v. Clinton*, 730 F. Supp. at 198, 200-01 (comparing state's 16% black total population with 6 of 135 majority black House and Senate districts, although blacks are heavily concentrated in the southeastern portion of the state). *Cf. Shaw v. Barr*, 808 F. Supp. 461, 472 (E.D.N.C.), *prob. juris, noted sub nom. Shaw v. Reno*, —— U.S. ——, 113 S.Ct. 653-54 (1992) (comparing number of black majority districts in state's congressional plan with statewide black population, not merely with black population percentage in area where minority districts were drawn).

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[14] This case illustrates the inherent difficulty of choosing a subregion of the state as the reference point for measuring the proportionality of minority representation. Dade County cannot reasonably provide that reference point, because the state's plan itself contains districts that cross the Dade County line.

For all these reasons, Florida failed to make out a valid defense of proportional representation to the Section 2 vote dilution claim asserted by the United States and the *De Grandy* plaintiffs.

II. *GINGLES* FACTOR 1 IS SATISFIED BY PROOF THAT THE MINORITY GROUP COULD COMPRISE A MAJORITY OF THE VOTING AGE POPULATION IN ONE OR MORE ADDITIONAL SINGLE-MEMBER DISTRICTS, AND THE COURT SHOULD NOT ENGRAFT NEW REQUIREMENTS ONTO THE *GINGLES* TEST

The district court found that the proof offered by the United States and the minority plaintiffs established the presence of each of the three factors deemed central to a vote dilution claim in *Thornburg v. Gingles*. Florida's appeal, however, attacks the district court's findings as to *Gingles* factor 1—that is, the court's conclusion that the Hispanic population is "sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50.

Even though Hispanics of voting age would constitute a minimum of 60% of the population in all 11 of appellees' proposed alternative districts, and the district court made detailed findings that the Hispanic population level in the proposed districts was sufficient to elect candidates preferred by Hispanics to office, Florida argues that *Gingles* factor 1 was not satisfied because some of the proposed alternative districts may not have majorities of Hispanic voting age *citizens*. On that ground alone, the state argues, the minority plaintiffs' vote dilution claim should have been rejected.

This argument invites the Court to engraft unwarranted evidentiary requirements onto the *Gingles* factor 1 analysis—requirements that are inconsistent with the purpose of the *Gingles* test and of amended Section 2. This Court should reject the state's contention.

The *Gingles* factor 1 test is unique among the three so-called *Gingles* factors; it is the only factor that has no source either in the text of the statute or among the relevant factors listed in the authoritative statement of Section 2's legislative intent, the Senate Report accompanying the 1982 amendment of the Voting Rights Act ("Senate Report"). *See* S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07.[15] As a judicially developed test, *Gingles* factor 1 is designed to help structure the analysis of Section 2 claims, by ascertaining whether the minority group would have the potential to elect candidates of choice to office if the challenged electoral structure were altered. 478 U.S. at 50 n.17.[16] The restrictive interpretation of this factor urged by the state, however, would improperly transform the *Gingles* factor 1 analysis into a formidable obstacle to the full consideration of vote dilution claims. Such a restrictive interpretation is not justified by the Court's reasoning in *Gingles*. Moreover, given the lack of support for *Gingles* factor 1 in the text of Section 2 of the Senate Report, such a restrictive interpretation of *Gingles* factor

[15] *Gingles* factors 2 and 3, which ask whether the minority group is politically cohesive (based primarily on evidence of minority electoral support for particular candidates, 478 U.S. at 51) and whether white bloc voting generally defeats the candidates preferred by minority voters, *id.*, are drawn from Senate Report factors 2 ("the extent to which voting in the elections of the State or political subdivision is racially polarized"), and 7 ("the extent to which members of the minority group have been elected to public office in the jurisdiction"). S. Rep. No. 417 at 28-29, 1982 U.S.C.C.A.N. at 206-07. *See also* Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, as amended ("The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered").

[16] *See* Bernard Grofman & Lisa Handley, *Identifying and Remedying Racial Gerrymandering*, 8 J. of L. & Pol. 345, 376 (1992) ("[W]e may take a fifty percent voting age share district as presumptive evidence (albeit not the only possible evidence) of such a potential").

1 would undermine its legitimacy as a judge-made tool of analysis for Section 2 claims.

A. *Gingles* Factor 1 Does Not Require Proof of Citizen Voting Age Majorities

The state argues that because the word "citizens" appears in Section 2 of the Voting Rights Act,[17] *Gingles* factor 1 requires proof that the proposed alternative districts will have a majority of Hispanic voting age citizens. The fallacy of this argument is its assumption that *Gingles* factor 1 is a test set forth in Section 2 whose interpretation must therefore be controlled by the statutory language of Section 2.

That assumption is erroneous, because Section 2 nowhere states that minority citizens must prove that they would constitute any specific quantum of the population in a proposed single-member district as a precondition to establishing a violation of the section. *Gingles* factor 1 is a judge-made test, not a statutory requirement for a Section 2 claim. The manner in which the *Gingles* factor 1 test can be satisfied, therefore, depends upon the purpose for which the *Gingles* 1 test was created, not upon the use of the word "citizens" in the statute.[18] Thus, even if the word "citizens" in Section 2 is read as excluding lawsuits by noncitizens, that limitation is in no way con-

[17] "A violation . . . is established if, based on the totality of circumstances it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [the Act]." 42 U.S.C. § 1973, as amended.

[18] Indeed, if the term "citizens" controlled the proper interpretation of *Gingles* factor 1, the state's argument would still fail. Section 2 uses the term "citizens," not "voting age citizens." Accordingly, if the statutory language is controlling of the proper interpretation of *Gingles* factor 1, plaintiffs need only prove that they would constitute a majority of the Hispanic *citizens* in the alternative single-member districts, not a majority of the *voting age* Hispanic citizens.

trolling of the question whether the alternative districts proposed by the appellees below were adequate to satisfy the *Gingles* factor 1 test.

B. Appellees' Proof Satisfies the Requirements of the First *Gingles* Factor

Appellees' proof unquestionably satisfied the literal terms of the *Gingles* test, which asks whether minorities could comprise "a majority in a single-member district." 478 U.S. at 50. Not only would Hispanics be in the "majority" in each of appellees' eleven proposed districts, but they would in fact constitute supermajorities of at least 64% in each district. This is true regardless of whether a simple majority of the population is adequate to satisfy *Gingles* factor 1, as the language of *Gingles* itself indicates, or whether voting age population is considered, as some cases interpreting *Gingles* have required. *See McNeil v. Springfield Park Dist.*, 851 F.2d at 944-45.

Moreover, in *Gingles* this Court explained that the purpose of *Gingles* factor 1 is to determine whether "minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice." 478 U.S. at 50 n.17 (emphasis in original). In this case, the district court specifically found that "eleven geographically compact [House] districts can be drawn in which Hispanics in Dade County would have the potential to elect candidates of their choice." J.S. App. at 68a. This factual finding is supported by expert testimony and by evidence of the past success of Hispanic-preferred candidates in districts with Hispanic population percentages similar to those in appellees' proposed districts. J.S. App. at 31a-32a, 39a-40a & n.28. This is enough to establish that appellees would have an enhanced opportunity to elect candidates of their choice to office under an alternative election system.[19]

[19] *See* Grofman & Handley, *supra* note 16, at 357 ("there must be an alternative to the challenged practice judged against whose baseline fairer representation would have been possible").

Indeed, this Court need look no further than the population percentages in the *state's* majority-Hispanic districts to reject the state's attack on the court's factual finding. In the state's plan, the nine majority Hispanic House districts in South Florida have Hispanic voting age population majorities ranging from 63.85% in District 107 to 83.64% in District 110. Defendants' Joint Exhibit 2, J.S. App. 206a-208a. The state argued throughout the litigation that these population percentages were sufficient to allow Hispanics to elect candidates of choice to office in all nine of these districts, including District 107; indeed, in this Court the state contends that Hispanic electoral success in these nine districts is so predictable as to provide Hispanics with proportional representation in the Florida House. Not one of the eleven districts proposed by appellees, however, has an Hispanic population percentage as low as that in District 107 of the state's plan. Instead, the eleven proposed districts range from 64.5% to 78.2% in Hispanic voting age population. *Id.* In other words, none of appellees' proposed districts—which allegedly were inadequate to satisfy *Gingles* factor 1—had an Hispanic majority as small as that in the state's District 107, a district which the state contends will *guarantee* the election of an Hispanic-preferred candidates for the remainder of the decade.[20] The state's argument that appellees' alternative districts failed to satisfy *Gingles* factor 1 is thus meritless for this reason alone.

Although the state produced statistical estimates indicating that Hispanic *citizen* voting age percentages might fall below 50% in some districts in an 11-district plan, that same analysis also estimated that three of the *state's* nine Hispanic majority districts fall below 50% in Hispanic citizen voting age population. J.S. App. at 206a-208a. Again, of all the South Florida House districts in

[20] Hispanic candidates were elected in each of the nine Hispanic majority districts in the state's plan.

all the plans analyzed by the state, the district with the *lowest* estimated Hispanic citizen voting age percentage was District 107 in the *state's* plan, with an Hispanic citizen voting age population of 46.74%. *Id.* at 206a. Moreover, all three majority Hispanic *Senate* districts in the state's Senate plan are *also* estimated to have less than 50% Hispanic citizen voting age populations. J.A. at 454 (state's Hispanic Senate districts range from 42.8% to 49.1% in Hispanic citizen voting age population). Thus, if the state's analysis establishes anything, it establishes that the level of Hispanic citizen voting age population estimated by the state's expert is not determinative of the question posed by *Gingles* factor 1—whether minorities would have "the *potential* to elect representatives" in the proposed alternative districts. 478 U.S. at 50 n.17 (emphasis in original).[21]

Furthermore, a focus on citizenship cannot be justified on the theory that the *Gingles* factor 1 majority must consist of eligible voters. Many persons of voting age are ineligible to vote for reasons other than citizenship: some voting age persons may not be year-round residents (a particularly pertinent category in Florida); some may be incarcerated for disqualifying felonies; some may be members of the armed forces or college students who maintain voting residence elsewhere; some may be homeless and therefore ineligible to vote in some states. If voting-age persons who are ineligible to vote must be excluded from the *Gingles* factor 1 equation, there is no principled

[21] Indeed, while the Florida House argues in this Court that no district with less than a 50% Hispanic citizen voting age population is capable of electing an Hispanic candidate of choice to office, the Florida Senate argues in this Court that a district with an African-American voting age population of 35.5%—and an unknown citizen voting age population—provides African-Americans with the opportunity to elect a candidate of choice to office. *See, De Grandy v. Wetherell*, No. TCA-92-40015-WS, slip op. (N.D. Fla. July 17, 1992) (three-judge court), J.S. App. at 65a; Florida Senate's Motion to Dismiss or Affirm at 25, *De Grandy v. Wetherell* and *United States v. Florida*, Nos. 92-593 and 92-767.

basis to exclude only those who are ineligible by virtue of noncitizenship, while not excluding persons who are ineligible to vote in the district for other reasons. Indeed, excluding noncitizens from the calculation would ordinarily tend to decrease the apparent Hispanic percentage of a district in South Florida, but excluding army personnel or part-year residents might well tend to *increase* the Hispanic population percentage. Accordingly, no balanced approach to *Gingles* factor 1 could warrant singling out citizenship to the exclusion of other eligibility criteria.

Thus, if the state's interpretation of *Gingles* factor 1 were correct, proof of that factor would presumably depend upon first establishing the total number of persons in the proposed district who are voting-age, U.S. citizens not disqualified from voting by felony convictions and who have year-round residences in the district and are not members of the armed forces or college students with voting residences elsewhere; and then determining the percentage of those persons who are Hispanic. Such an exercise is totally inconsistent with the threshold nature of the *Gingles* factor 1 test, and would transform that test from a useful tool of analysis into a mini-trial of demographic arcana. Florida's proposed gloss on the *Gingles* standard would thereby provide a potent weapon for defendant jurisdictions, forcing unwarranted expenditures by minority plaintiffs in order to survive even the first elementary step of the Section 2 analysis.

In *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969), this Court held that the Voting Rights Act should be construed in a manner that provides "the broadest possible scope" for eliminating racial discrimination. Florida's restrictive interpretation of the *Gingles* standard directly conflicts with this directive and should be rejected.

CONCLUSION

For these reasons, the judgment below should be affirmed.

Respectfully submitted,

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